United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7450

To be argued by
MARK D. GERAGHTY

B

P/S

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

DAILY MIRROR, INC.,

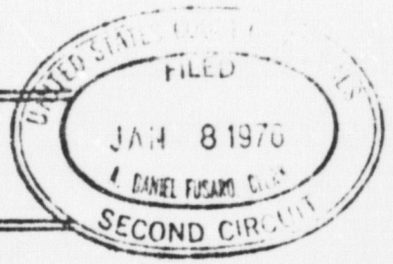
Plaintiff-Appellant,

—against—

NEW YORK NEWS INC., HARRY GARFINKLE, UNION NEWS COMPANY, INC., AMERICAN NEWS COMPANY, INC., and ANCORP, INC.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK,
HONORABLE MARVIN E. FRANKEL, DISTRICT JUDGE



BRIEF FOR DEFENDANT-APPELLEE NEW YORK NEWS INC.

TOWNLEY, UPDIKE, CARTER & RODGERS
Attorneys for Defendant-Appellee,
New York News Inc.
220 East 42nd Street
New York, New York 10017
(212) 682-4567

MARK D. GERAGHTY
FREDERICK D. BERKON
Of Counsel

4

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

Cases: Page

Cases:

Cases: Page

Cases: Page

Cases: Page

Cases: Page

Cases: Page

Statutes and Rules:

Statutes and Rules: Page

Miscellaneous Authorities:

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DAILY MIRROR, INC.,

Plaintiff-Appellant,

-against-

NEW YORK NEWS INC., HARRY GARFINKLE, UNION NEWS COMPANY, INC., AMERICAN NEWS COMPANY, INC., and ANCORP, INC.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, HONORABLE MARVIN E. FRANKEL, DISTRICT JUDGE

BRIEF FOR DEFENDANT-APPELLEE NEW YORK NEWS INC.

PRELIMINARY STATEMENT

This appeal is before this Court by reason of a notice of appeal filed by plaintiff in the United States District Court for the Southern District of New York, on July 31, 1975 from an order of Hon. Marvin E. Frankel, dated July 3, 1975 and entered in the Clerk's office on July 7, 1975, which denied a motion made pursuant to Rule 60(b) of the Federal Rules of Civil Procedure to vacate (i) an order of Judge Frankel dated June 9, 1975, which (a) denied an application made by plaintiff

requesting Judge Frankel to recuse himself, (b) denied a motion made by plaintiff for further discovery and (c) granted a motion made by defendants for summary judgment dismissing the complaint; and (ii) the judgment dismissing this action which was entered by the Clerk on June 11, 1975. (JA 84; DSA 133*). While no notice of appeal was filed from the order of June 9, 1975 and the judgment of June 11, 1975, plaintiff filed a document entitled "Amended Notice of Appeal" on October 17, 1975 by which it purported to amend its notice of appeal filed July 31, 1975 nunc pro tunc to specify the order of June 9, 1975, and the judgment of June 11, 1975 as the order and judgment being appealed. (JA 259).

This brief is submitted on behalf of defendant-appellee New York News Inc. (the "News") which seeks alternatively dismissal of this appeal or an order affirming the order of the District Court dated July 3, 1975 and entered July 7, 1975 and the order of the District Court dated June 9, 1975 and the judgment entered thereon June 11, 1975.

STATEMENT OF ISSUES

Plaintiff's Statement of the Issues assumes its ability to appeal from the order of June 9, 1975 and the judgment entered June 11, 1975.

*The contents of the "Joint Appendix" filed by plaintiff was never agreed to by the defendants. It was therefore necessary for defendant-appellee New York News Inc. to file a Supplemental Appendix. References to plaintiff's appendix will be "JA" and "SA" depending on the volume and references to the Supplemental Appendix of defendant-appellee New York News Inc. will be "DSA".

A motion to dismiss the within appeal was made by the News and argued before a panel of this Court on November 18, 1975. The motion was denied without prejudice to renew before the panel hearing this appeal.

By reason of the foregoing, the issues which will be discussed in this brief include the question of whether this appeal should be dismissed, as well as questions relating to the merits of Judge Frankel's order of July 3, 1975 and June 9, 1975 and the judgment dismissing this action.

1. May a party appeal from an order and judgment from which no timely notice of appeal was ever filed by having filed a notice of appeal only from an order denying a motion to vacate such order and judgment?

2. With respect to the order of July 3, 1975, entered on July 7, 1975, did Judge Frankel clearly abuse his discretion in denying plaintiff's motion to vacate his order of June 9, 1975, and the judgment entered thereon, June 11, 1975?

3. With respect to the order of June 9, 1975, did Judge Frankel properly decline to recuse himself from the case on plaintiff's application before he denied plaintiff's motion for further discovery and granted defendants' motion for summary judgment?

4. With respect to the order of June 9, 1975, and the

judgment entered thereon on June 11, 1975:

(a) Did Judge Frankel correctly hold that defendants were entitled to summary judgment despite the absence of opposing papers from plaintiff?

(b) Was there an absence of an issue of triable fact which warranted summary judgment in favor of defendants?

(c) As an alternative to a dismissal on the merits was the action below properly dismissed because of plaintiff's failure to prosecute?

STATEMENT OF THE CASE

The action below was terminated upon the entry of a judgment on an order which granted a motion made by defendants for summary judgment. (DSA 133). The motion for summary judgment, which was made more than four years after the action was instituted and after plaintiff had had more than an adequate opportunity to gather facts to support its claim, was never contested. (JA 91).

The complaint sought treble damages of $90,000,000 and charged that the defendants had conspired to drive plaintiff's newspaper out of business. (DSA 1). After the action was instituted it laid dormant for two years. It was reactivated only after threat of dismissal for lack of prosecution. (JA 85). It was clear from the first time plaintiff answered interrogatories

that it had no facts to support its claims and that those claims were a blend of conjecture, suspicion and fantasy. (JA 92-93; DSA 99). Conceding that it had no facts of its own to support its claims, plaintiff conducted depositions of, and propounded interrogatories to, defendants. These discovery efforts had developed no factual support for the allegations of plaintiff's complaint by the time this case was assigned to Judge Frankel in March of 1975 under the Southern District's "Plan for the Reallocation and Disposition of Three-Year-Old Civil Cases". (DSA 83-95). Defendants announced the desire to move for summary judgment and plaintiff asked to take further depositions. Judge Frankel permitted the taking of the depositions and set a schedule for the submission of the summary judgment motion. (JA 87-88).

The further depositions were taken and the motion was made. The schedule fixed for the submission of the summary judgment motion was strict and Judge Frankel admonished all that he expected counsel to adhere to the schedule. (SA 53). Instead of filing papers in opposition to the motion for summary judgment, plaintiff filed a motion for further discovery. (JA 88). On the return date of the motion, a week after opposing papers were due, Judge Frankel's chambers called plaintiff to inquire whether it intended to file opposing papers. Plaintiff requested a week in which to do so and was given four days. (JA 88-89). At the last moment, instead of opposing the motion for summary judgment, plaintiff requested Judge Frankel to recuse himself, although the application was completely lacking in merit and

had no foundation in fact. (JA 90-91). Judge Frankel denied the application and then went on to deny the motion for further discovery and granted defendants' motion for summary judgment. (JA 91).

Plaintiff attempts to cast the events beginning in March, 1975, as an unfair rush to judgment in which it was not accorded fair treatment or the opportunity to show it was entitled to a trial. In doing so it has distorted the events below so that they are barely recognizable. This brief will not deal point by point with these distortions but will in the Statement of Facts which follows, recount the course of events below to show that Judge Frankel fairly and correctly disposed of this meritless lawsuit.

STATEMENT OF FACTS

A. The History of this Action

Plaintiff was the publisher of the "Daily Mirror" (the "Mirror") a morning newspaper, bearing no relationship to the Hearst Corporation's "New York Mirror" which had been discontinued

in 1963. (JA 6, 10).*

Plaintiff had been publishing the Mirror for two months when this action was instituted on March 16, 1971. (DSA 88). On that date a summons and complaint was filed in the United States District Court for the Southern District of New York, naming the News, Henry Garfinkle (sued herein as Harry Garfinkle), the American News Company, Inc., the Union News Company, Inc. and Ancorp., Inc. (collectively "Ancorp") as defendants. (JA 2; DSA 1). When the complaint was filed the News, as it is now, was the publisher of a daily morning and Sunday newspaper. Mr. Garfinkle was and until 1972 continued to be Ancorp's chief executive officer. Ancorp was and continues to be, inter alia, in the business of selling newspapers from newsstands to the general public. (DSA 88). The complaint charged all defendants with violations arising under Title 15 U.S.C. Sections 1 and 2 (the Sherman Act), Section 340 of the New York General Business Law (the Donnelly Act) and the common law of New York and claimed treble damages in the aggregate amount of $90,000,000. (DSA 1).

The Daily Mirror discontinued publication on March 1, 1972. (DSA 93). During the period in which the Mirror was

*After the demise of the "New York Mirror", the News purchased certain of its assets (including its name and various journalistic features) from the Hearst Corporation. (DSA 88; JA 212-224).

published, plaintiff's chief executive officer was Robert W. Farrell. (JA 6). As far as it is known, Mr. Farrell continues in that capacity today. He has been plaintiff's counsel of record since 1973. (JA 2). In its short life the Mirror had a daily circulation estimated to be anywhere between 75,000 copies to 180,000 copies by Mr. Farrell and 50,000 copies per day by estimates of independent members of the newspaper trade. (DSA 92-93).

Generally, the complaint alleged that "commencing in or about January 1971" the defendants combined and conspired to restrain and monopolize trade and commerce in the dissemination of the news and newspapers with the objective of destroying the Mirror and driving plaintiff out of business by means of an alleged agreement not to sell the Mirror from newsstands or other distribution outlets served or controlled by defendants and to suppress and eliminate competition between newspapers, thus creating a monopoly in the dissemination of the news. (DSA 3-5).

The complaint alleged that defendants did the following specific acts in furtherance of the conspiracy: (a) refused to carry plaintiff's newspaper and to distribute it to newsstands in New York City and elsewhere; (b) exerted pressure on those whom defendants regularly distributed newspapers and periodicals to compel such persons from carrying the Mirror on their newsstands and to refrain from advertising in the Mirror; (c) sponsored and helped the News in order to eliminate the distribution and sale of the Mirror, thereby depriving the

Mirror of a "very substantial portion of its circulation"; and (d) attempted to divert and in fact diverted a "very substantial portion" of the advertising which might have been placed in the Mirror. (DSA 3-5).

The Mirror was sold from Ancorp's newsstands for a one week period in January, 1971. Sales from those newsstands were thereafter discontinued and were never resumed. (DSA 108-109).

B. Proceedings in the District Court preceding the dismissal of the complaint

As can be seen, this action was instituted just two months after the Mirror began its publication on January 4, 1971 and after its brief appearance on Ancorp's newsstands came to an end. However, after filing the complaint, plaintiff failed to take a single step in the prosecution of its case for more than two years. (JA 85; DSA 93). Defendants, in the meanwhile, had answered the complaint and the News, on April 7, 1971, served detailed interrogatories which were intended to discover the facts upon which plaintiff based its claims. (DSA 11). Those interrogatories went unanswered despite the fact that an order was finally entered that answers be served by July 16, 1973. When this order was not complied with, the News moved for dismissal of the action. (DSA 34-35). It was only under this threat that plaintiff answered those interrogatories and took depositions in the fall of that year.

During the period from September, 1973, to February, 1974, plaintiff deposed an officer and one employee of the News, defendant Garfinkle and two partners of this firm.* (DSA 93-94).

On February 4, 1974, the News served a second set of interrogatories which plaintiff answered on March 1, 1974. (DSA 36, 96; JA 10). As in the case of the first set of interrogatories, the sum of plaintiff's answers was that plaintiff had no evidence to support the allegations in its complaint. (DSA 96-99).

A pre-trial conference was called for February 28, 1974, at which Judge Carter directed that all discovery be concluded by April 12, 1974. Plaintiff failed to attend that conference but was advised of the results. (DSA 51-52).

Plaintiff then served interrogatories on the News to which the News responded in part and objected in part on May 3, 1974. (DSA 94). Plaintiff made no motion pursuant to the provisions of Rule 37 of the Federal Rules of Civil Procedure with respect to any of the objections asserted by the News.

On the day discovery was to be concluded, April 12, 1974, plaintiff moved for leave to take further depositions. (DSA 53). Defendants opposed this motion on the grounds that

*A full account of all discovery, depositions and interrogatories and the results of such discovery are discussed on pp. 56 to 60 of this brief.

the time to complete discovery had expired and that further depositions would not lead to discovery of material and relevant information. (DSA 55). Defendant Ancorp asserted as an additional ground for denying or staying discovery the existence of a general stay order in a bankruptcy proceeding. (DSA 24).*

On June 5, 1974, plaintiff's motion for further discovery was denied without prejudice because of the bankruptcy stay. At the same time plaintiff was invited to seek relief in the bankruptcy court. (JA 24). Plaintiff moved in the bankruptcy court on June 17, 1974, to vacate the stay. There being no opposition, the motion was granted on September 12, 1974. (JA 21-22).

Plaintiff's motion for further discovery was then renewed. (JA 25-26). Defendants continued to oppose the motion and on November 15, 1974, Judge Carter entered an order denying the motion. (DSA 75).

On March 4, 1975, plaintiff moved to reargue its motion of April 12, 1974 for further discovery. (DSA 76-77). Before the motion could come on for argument, this action was reassigned to Judge Frankel under the Southern District's "Plan for the Reallocation and Disposition of Three-Year-Old

*Contrary to plaintiff's persistent contention below and on this appeal, the News never took a position with respect to Ancorp's application. (SA 57).

Civil Cases" on March 14, 1975. (JA 86).

A pre-trial conference was called for March 26, 1975. (JA 86). During that conference, trial was set for June 9, 1975. (JA 87). The Court agreed to defendants' request that it entertain a motion for summary judgment by defendants, but set a strict schedule for submissions. (JA 87-88). The Court, while denying plaintiff's motion for further discovery, permitted plaintiff to take the deposition of three individuals, provided it was done immediately. (DSA 78; SA 40-42, 44). Under the schedule fixed by the Court, defendants were obligated to submit motion papers by April 21, 1975 and plaintiff was given until May 12, 1975, to file answering papers. (SA 44). Two brief extensions were granted to the News to permit the last three depositions to be completed and transcripts to be available. (SA 44-47, 51-53). The final schedule of submissions, which was adhered to by defendants, required that the motion be made by May 5, 1975, and that plaintiff's answering papers be filed by May 19, 1975. (SA 53). As may be seen plaintiff was in no way prejudiced by the two short adjournments.

Apparently in anticipation of defendants' submission of the motion for summary judgment, on April 26, 1975 plaintiff's attorney wrote to Judge Frankel requesting additional discovery including the production of certain documents. (SA 54-56). In

that letter, Mr. Farrell asked the Court to readjust the scheduled trial date, caustically accusing the courts and defendants -- indeed everyone but himself -- for the delay in the prosecution of his case. (SA 54-56).

At Judge Frankel's invitation, counsel for the News on April 29 responded to plaintiff's April 26, 1975 letter denying the wild assertions contained in the letter and opposing further discovery in view of the impending motion for summary judgment. (SA 57-62).

By letter dated May 1, 1975, Judge Frankel disposed of the requests contained in plaintiff's April 26, 1975 letter by denying plaintiff's request, with one exception. (SA 66). In his letter Judge Frankel expressed his view that he looked with disfavor on attempts to continue and expand discovery at that late date. (SA 66). Further, Judge Frankel stated that in the future all relief requested by plaintiff would have to be made by proper motion papers, but cautioned that any requests for further discovery at such a late date would probably not be permitted. (SA 66).

In his letter Judge Frankel directed the News to produce an agreement by which the News had purchased certain assets from the Hearst Corporation in 1963. (SA 66). In response to Judge Frankel's direction, on May 2, 1975, the News mailed a conformed copy of that agreement. (DSA 121). Plaintiff

immediately returned the copy stating, without reason, that the News' offer did not comply with Judge Frankel's direction.* (SA 68).

On May 5, 1975, the motion for summary judgment was filed. (JA 2). On the same day this firm wrote to Judge Frankel complaining of a lack of cooperation by plaintiff's counsel in filing deposition transcripts and providing certain documents marked for identification in the depositions which defendants wished to submit in connection with their motion for summary judgment. (SA 71-73).

The May 5, 1975 letter appears to have caused Judge Frankel to file a memorandum on May 6, 1975, in which he cautioned all counsel to cease the spate of correspondence with which he was being favored. (SA 75-76). In that memorandum he again expressed the view that the case should be prepared speedily for some form of final disposition. (SA 75). Apparently, it is the memorandum of May 6, 1975 which plaintiff's attorney claims is the source of his "feeling of discomfort"

*On May 16, 1975, this firm sent Mr. Farrell a clearer copy of the signature page of the conformed copy of the agreement as well as a copy of the signature page of the original agreement after plaintiff advised that the names of the signators could not be read. Thus, the names of the signators, were known to plaintiff as of that date. Apparently, Mr. Farrell is still dissatisfied since the contract price was never included in the copy. We believed then, as we do now, that the contract price, or for that matter the 1963 agreement itself, has utterly no relevance to this lawsuit. (DSA 79-80).

and evidence of Judge Frankel's purported bias and prejudice toward plaintiff's cause. (JA 73; App. Br. 37).

Plaintiff never responded to defendants' motion for summary judgment. (JA 91). Instead of submitting opposing papers, plaintiff made an independent motion for further discovery and production of documents returnable on the same day as the motion for summary judgment. (JA 28-29). The affidavit filed in support of the discovery motion did not deal in any way with the issues raised on the motion for summary judgment and the proferred basis for additional discovery was totally without merit. (JA 30-38). Defendant News duly opposed this motion pointing out that there was utterly no basis for additional discovery at that late date. (DSA 119-132).

According to Judge Frankel's memorandum decision and order of June 9, 1975, plaintiff's attorney was contacted by the Judge's chambers on the afternoon of May 27, 1975, once it was apparent that no answering papers to the motion for summary judgment were being submitted. (JA 89). Thereupon, plaintiff's counsel asked for an additional week to submit opposing papers. He was given until May 30, 1975. (JA 89).

As may be seen, despite plaintiff's total disregard for the court's briefing schedule, Judge Frankel chose to give plaintiff one further opportunity to file papers pursuant to a request made a week after they were due! Indeed, the Court

then communicated with defendants informing them of his action and directing that any reply papers be filed by June 2, 1975, which implied a full working weekend for defendants' counsel. (JA 100).

Of course, plaintiff never filed opposing papers. Instead, on the afternoon of May 29, 1975, the day before its answering papers were due, plaintiff's counsel called the Court to state that plaintiff would not submit opposing papers, but instead was filing an application requesting Judge Frankel to recuse himself. (JA 89). The application was never served on counsel for defendants, and for some reason, never fully explained by plaintiff's counsel, was not in fact filed in the Clerk's office until June 3, 1975. (JA 2, 89-90).

On June 2, 1975, Judge Frankel wrote a letter to all counsel in which he stated that plaintiff filed no response to the summary judgment motion and that although he had been advised of plaintiff's intention to file a recusance application, it could not be found in the Clerk's office. (SA 78-79). As a result, he put off the trial date to June 16, 1975. (SA 79). At the same time, he indicated that he would turn to the summary judgment motion within the next day or two and that he would give full attention to any recusance application of plaintiff if and when he received it. (SA 79). Thus, once again, Judge Frankel postponed decision on the motion for summary judgment in order to accommodate plaintiff.

Once the application for recusance was filed on June 3, 1975, Judge Frankel offered defendants an opportunity to be heard. Defendants either by letter, or in the case of the News, by letter and affidavit took the opportunity to comment. (JA 95-102).

Six days later, on June 9, 1975, Judge Frankel filed a memorandum and order in which he: (1) denied plaintiff's application for recusance; (2) denied plaintiff's motion for further discovery; (3) granted defendants' motion for summary judgment dismissing the complaint; and (4) dismissed the complaint on the alternative and/or additional ground of lack of prosecution. (JA 2, 84-94).

C. Proceedings and events after dismissal of the complaint

Judgment was entered by the Clerk of the District Court for the Southern District of New York dismissing the complaint on June 11, 1975. (JA 2; DSA 133).

On June 17, 1975, plaintiff served a motion seeking to vacate the order of June 9, 1975, and the judgment of June 11, 1975. (JA 2, 103). The motion was made returnable July 3, 1975. (JA 103). A supporting affidavit was served with the motion papers together with a separate affidavit which again asked Judge Frankel to recuse himself. (JA 103-135). The notice of motion also had the following statement annexed: "...the undersigned

will serve and file a second affidavit concerned with the merits of plaintiff's case within 8 days from the date hereof..." (JA 104).

Judge Frankel refused to recuse himself in an order dated June 24, 1975. (JA 226).

On June 27, 1975, the second part of plaintiff's motion to vacate, consisting of what purported to be an affidavit on the merits, was received by this firm. (JA 178). Opposing papers were filed and the motion was denied by Judge Frankel on July 3, 1975 in an order entered on July 7, 1975. (JA 2, 134-136, 244-245).

Plaintiff failed to file a notice of appeal within thirty days from the order of June 9, 1975 or from the judgment entered thereon June 11, 1975. No application was ever made seeking an extension of time within which to file such a notice of appeal. Plaintiff did, however, file a notice of appeal on July 31, 1975, designating only the order entered July 7, 1975 which denied its Rule 60(b) motion as the order from which it appealed. (JA 258).

Although plaintiff's notice of appeal clearly designated the order entered July 7, 1975 as the order appealed from, it later became apparent that plaintiff was actually attempting to appeal from the order of June 9, 1975, and the judgment entered thereon on

June 11, 1975. For example, on August 11, 1975, the plaintiff's Civil Appeal Pre-Argument Statement listed issues which pertained exclusively to the merits of Judge Frankel's order of June 9, 1975, and the judgment of June 11, 1975.*

After plaintiff was advised of defendants' view that its appeal did not bring up for review the order of June 9, 1975 and the judgment of June 11, 1975, on October 17, 1975, plaintiff filed a document entitled "Amended Notice of Appeal" which purported to appeal "nunc pro tunc" from said order and judgment. (JA 259).

On November 5, 1975, the News moved to dismiss plaintiff's appeal in its entirety or in the alternative to strike the "Amended Notice of Appeal" and to dismiss so much of the appeal as purported to be from the order of June 9, 1975 and the judgment of June 11, 1975. Indeed, before the motion was heard by a panel of this Court, plaintiff's brief on appeal was served and filed and its contents confirmed the News' contention that plaintiff was actually seeking review of said order and judgment.

The News' motion to dismiss was denied on November 18, 1975 without prejudice to defendants' right to renew their request for dismissal before the panel hearing this appeal.

*See affidavit in support of motion to dismiss appeal.

SUMMARY OF ARGUMENT

The News, as a first remedy seeks dismissal of this appeal. Point I demonstrates that this Court is without jurisdiction to review Judge Frankel's order of June 9, 1975 and the judgment dismissing this action entered on June 11, 1975 because no timely notice of appeal was ever filed from said order and judgment. Point I also demonstrates that plaintiff, while it did file a timely notice of appeal from Judge Frankel's order entered July 7, 1975 denying its motion to vacate made pursuant to Rule 60(b), has failed to present to this Court for review the sole legal issue which has been preserved for review -- the question of whether Judge Frankel clearly abused his discretion in denying the motion to vacate.

In the event this Court declines to dismiss the appeal as requested in Point I we urge the following:

(a) If this Court finds that it has jurisdiction to review the order entered on July 7, 1975, Point II demonstrates that Judge Frankel did not clearly abuse his discretion in denying the motion to vacate made pursuant to Rule 60(b) since he had properly disposed, in the first instance, of plaintiff's motion for further discovery, plaintiff's application for recusance and defendants' motion for summary judgment in his memorandum and order of June 9, 1975 and

properly considered plaintiff's motion to vacate, itself.

(b) If this Court finds that it has jurisdiction to review the order of June 9, 1975 and the judgment of June 11, 1975, Point III demonstrates that Judge Frankel correctly denied plaintiff's application for recusance in that said application was totally without legal sufficiency; Point IV demonstrates that summary judgment was properly granted despite the absence of opposing papers; Point V demonstrates that summary judgment was required because of the absence of any triable issues of fact, even if plaintiff's tardy affidavit on the "merits" is treated as its opposing papers; and Point VI demonstrates that Judge Frankel's order dismissing the action below was proper on the alternative and/or additional ground that there was a failure to prosecute because of plaintiff's failure to oppose the motion for summary judgment and because of its continuous pattern of delay and its disobedience of the Federal Rules and court orders.

POINT I

THIS COURT HAS NO JURISDICTION TO HEAR PLAINTIFF'S APPEAL OR SO MUCH OF IT AS PURPORTS TO BE MADE FROM JUDGE FRANKEL'S ORDER OF JUNE 9, 1975 AND THE JUDGMENT ENTERED THEREON

A reading of plaintiff's brief on this appeal makes it very clear that it is seeking to have this Court review Judge Frankel's rulings contained in the memorandum and order of June 9, 1975.

However, the notice of appeal filed on July 31, 1975 designates specifically, and only, the order filed July 7, 1975 denying plaintiff's motion to vacate, as the order appealed from. (JA 258).

Plaintiff had thirty days in which to file a notice of appeal from the order of June 9, 1975, and the judgment entered thereon June 11, 1975. Rule 4(a), Federal Rules of Appellate Procedure. However, no notice of appeal was ever filed within the thirty day period. No application was made for an extension of the thirty day period pursuant to the provisions of Rule 4(a).

It is well established that a Federal Court of Appeals is without jurisdiction to hear an appeal from a judgment or order from which no timely notice of appeal was ever filed. Guido v. Ball, 367 F.2d 882 (2d Cir. 1966); Napier v. Delaware,

Lackawanna and Western R. Co., 223 F.2d 28 (2d Cir. 1955); Smith v. Lehigh Valley R. Co., 174 F.2d 592 (2d Cir. 1949); 9 Moore's Federal Practice ¶204.02[1] (2d Ed. 1975).

Plaintiff cannot rely on its notice of appeal from the order denying its motion to vacate made pursuant to Rule 60(b) in order to circumvent this basic jurisdictional principle. It is established that an appellant cannot indirectly appeal from the original judgment in an action by appealing from a subsequent order of the District Court denying a Rule 60(b) motion to vacate that judgment and thus avoid the consequences of failing to file a timely notice of appeal from the underlying judgment. Demers v. Brown, 343 F.2d 427 (1st Cir.), cert. denied, 382 U.S. 818 (1965); Perrin v. Aluminum Company of America, 197 F.2d 254 (9th Cir. 1952).

A denial of a Rule 60(b) motion does not bring up for review on appeal the judgment or order sought to be vacated or modified, nor does it allow an appellant to challenge the underlying judgment for error that it could have complained of on a direct appeal from such judgment. Hines v. Seaboard Air Line Railroad Co., 341 F.2d 229, 232 (2d Cir. 1965); Wagner v. United States, 316 F.2d 871, 872 (2d Cir. 1963); 7 Moore's Federal Practice ¶60.30[1].

The Ninth Circuit stated the rule clearly in Perrin v. Aluminum Company, supra, at p. 255 where it held:

"Rule 60(b) was not intended to be resorted to as an alternative to review by appeal, nor as a means of enlarging by indirection the time for appeal... Appellants had opportunity to obtain appellate review of the very rulings of which they now complain but failed to take advantage of the opportunity with the time prescribed by Rule 73(a). Having in consequence of their own lack of diligence been turned away at the front door they now seek entry at the rear door. Certainly Rule 60(b) was not designed to afford machinery whereby an aggrieved party may circumvent the policy evidenced by the rule limiting the time for appeal."

See also, Porter v. Chippewa County Cooperative Dairy, 161 F.2d 181, 182 (7th Cir. 1947) (where the Court dismissed an appeal that raised points related to an order from which a timely notice of appeal was not filed); Fern v. United States, 213 F.2d 674, 676 (9th Cir. 1954) (where the Court held that a timely notice of appeal filed as to a later appealable order, but filed after the expiration of time to appeal from earlier order dismissing complaint, did not operate to bring up the earlier dismissal for review).

This is not a case where this Court should review issues which ordinarily it would not have jurisdiction to hear.

In order to review the merits of Judge Frankel's order of June 9, 1975, and the judgment of June 11, 1975, this Court would have to hold (a) that the notice of appeal filed fifty days after the entry of judgment

was timely and (b) that plaintiff's failure to designate the order of June 9 and the judgment of June 11, 1975, in its notice of appeal as required by Rule 4(a) of the Federal Rules of Appellate Procedure was not a fatal defect.

The only way in which plaintiff's notice of appeal filed July 31, 1975, could be deemed timely with respect to the June 9, 1975 order the June 11, 1975 judgment would be to treat plaintiff's motion to vacate as one made pursuant to Rule 59(e) despite the fact that it was specifically made pursuant to Rule 60(b).

While there are decisions* which under compelling circumstances have treated a Rule 60(b) motion made within 10 days of the entry of a judgment or order as a Rule 59(e) motion so as to invoke the tolling provisions of Rule 4(a) of the Federal Rules of Appellate Procedure, those decisions should have no bearing on the treatment of the instant appeal.

In this case there is a threshold question of whether the motion to vacate made pursuant to Rule 60(b) was, in fact, made within ten days from the entry of judgment, June 11, 1975. Plaintiff served its papers in support of its motion in two

*Woodham v. American Cystoscope Co., 335 F.2d 551 (5th Cir. 1964); Southern States Equip. Corp. v. USCO Power Equip. Corp., 209 F.2d 111 (5th Cir. 1953); 9 Moore's Federal Practice ¶204.12[1] n. 11 (2d Ed. 1975).

parts. The notice of motion with one supporting affidavit was served by mail on July 17, 1975. (JA 178). As earlier noted the notice of motion contained a notice that an additional affidavit was to be served. (JA 104). Plaintiff's second affidavit was not served until June 27, 1975. (JA 178). Therefore, defendants could not even begin to respond to the motion until June 27, 1975.

When a Rule 59(e) motion is made with supporting affidavits, the service time is governed by Rule 6(d) which provides that the affidavits "shall be served with the motion" unless otherwise permitted by the court. 6A Moore's Federal Practice ¶59.12[3] (2d Ed. 1974). Plaintiff never requested permission from the court to serve a late affidavit. Therefore, plaintiff's motion to vacate was not served until June 27, 1975, sixteen days after the entry of judgment.

Beyond this, the decisions which treated Rule 60(b) motions as Rule 59(e) motions involved unique and compelling circumstances. In those cases, the failure to file a timely notice of appeal arose out of a confusion and uncertainty existing at the time the notice of appeal should have been filed.

In contrast there was nothing in the course of events below which could have misled or could have prevented plaintiff

from filing a timely notice of appeal from the judgment entered June 11, 1975. It simply chose not to do so. Certainly the intervening motion to vacate the judgment could have had no effect on plaintiff's decisions relative to its appeal. That motion was denied on July 3, 1975, and the order was entered on July 7, 1975. At that point plaintiff had a clear choice: It could have appealed from the order of June 9, 1975 and judgment of June 11, 1975 or the order entered July 7, 1975 or all of them. With all its alternatives still available, plaintiff chose to file its notice of appeal on July 31, 1975, which designated only the order entered July 7, 1975, as the order appealed from.

Even if plaintiff's motion to vacate were to be treated as a Rule 59(e) motion plaintiff never availed itself of the opportunity in the extended time period to file a notice of appeal which designated the order of June 9, 1975 and the judgment of June 11, 1975, as the order or judgment appealed from as is required by Rule 4(a) of the Federal Rules of Appellate Procedure.

Therefore, the question presented is whether this Court should take a second step, beyond treating the Rule 60(b) motion as a Rule 59(e) motion, in order to review the order of June 9, 1975, and the judgment of June 11, 1975 -- that is to treat the notice of appeal filed July 31, 1975, which

specifically, and only, designated the order denying the motion to vacate as the order appealed from as a notice of appeal from the underlying judgment.

In this connection reference must be made to Foman v. Davis, 371 U.S. 178 (1962). Foman, a case in which the appellant was an innocent victim who was sidetracked in a maze of technicalities, involved a unique set of circumstances and a factual pattern distinguishable in very substantial respects from those at bar.

In Foman plaintiff sued the executrix of her father's estate seeking her intestate share of the estate because her father had agreed not to make a will if she would care for her mother. The executrix was her father's second wife.

The complaint in the action was dismissed by the District Court on December 19, 1960 for failure to state a claim.

There followed a highly unusual series of events.

On December 20, 1960, one day after judgment was entered dismissing the action, plaintiff filed motions to vacate the judgment and to amend the complaint. Then, on January 17, 1961 plaintiff filed a notice of appeal from the judgment on December 19, 1960. On January 23, 1961, the District Court denied the December 20, 1960 motions. On January 26, 1961

plaintiff filed a notice of appeal from the denial of her motions to vacate.

However, the Court of Appeals in Foman, on its own accord, dismissed the appeal from the December 19 judgment dismissing the complaint. The Court reasoned that in the absence of a specific designation it would treat the motion to vacate as one pursuant to Rule 59(e)* thereby terminating the appeal time until January 23, the date the motion was denied. In giving this treatment it therefore viewed the first notice of appeal as premature and dismissed it on that ground. Since the second notice of appeal did not designate the judgment dismissing the complaint as the judgment appealed from, the Court reviewed only the order denying the motions to vacate.

Reversing this inherently unjust result, the Supreme Court held that in the compelling circumstances before it, the First Circuit "should have treated the appeal from the denial of the motions to vacate as an effective, although inept, attempt to appeal from the judgment sought to be vacated". Id. at 181. Clearly, the Court was reaching to deal with the

*The Court of Appeals suggested in this respect that if the motion had been specifically designated as a Rule 60(b) motion, it may not have been treated as a Rule 59(e) motion. This aspect of the First Circuit's opinion appears not to have been reversed. 292 F.2d 85, 87 (1st Cir. 1961). In the instant case plaintiff, according to its own account, specifically labelled its motion to vacate as one pursuant to the provisions of Rule 60(b). (App. Br. 1).

equities before it.

Here, unlike in Foman, no timely notice of appeal was ever filed which indicated that plaintiff was appealing from the June 9, 1975 order and the June 11, 1975 judgment. Plaintiff in this case, unlike the plaintiff in Foman, was not an innocent victim of technicalities.

Here, no equities lie with plaintiff which would justify, not only a treatment of its Rule 60(b) motion as a Rule 59(e) motion, but, in addition, excusing it for failing to designate the June 9, 1975 order and the June 11, 1975 judgment in its notice of appeal. Plaintiff has been represented through virtually all of this litigation by its own chief executive officer, who is also an attorney. (JA 2; DSA 90). It has consistently ignored the rules of practice which apply in the Federal Courts. It has adopted a cavalier attitude which culminated in the court below when it blatantly ignored defendants' motion for summary judgment. (JA 91). For this Court to reach out for jurisdiction over issues pertaining to a judgment from which no timely notice of appeal was ever filed would, in this case, be emasculating the Federal Rules of Appellate Procedure.

Courts, including this Circuit, have indicated an unwillingness to automatically excuse an appellant's failure to conform to the Federal Rules of Appellate Procedure when the

surrounding circumstances did not warrant such liberality. See e.g., Terkildsen v. Waters, 481 F.2d 201 (2d Cir. 1973) (where the Court held that a notice of appeal which failed to designate an award of pre-judgment interest was inadequate to present that issue for appeal); Smith v. Stone, 308 F.2d 15 (9th Cir. 1962) (where the Court held, in a case which was replete with incidents of disregard for rules and court orders, that a Rule 60(b) motion filed within 10 days of entry of the original judgment did not suspend the appeal time and was therefore without jurisdiction to review such judgment in the absence of a timely notice of appeal).

Finally, plaintiff's filing of an "Amended Notice of Appeal" which purports to appeal nunc pro tunc from the order of June 9 and the judgment entered thereon June 11, 1975 adds nothing to plaintiff's attempt to raise issues with respect to such order and judgment. (JA 259). We have found no rule or authority which allows an appellant, without a specific order from the District Court extending its time, to simply file a document of this nature to preserve an appeal. Beyond its dubious legal significance however, the "Amended Notice of Appeal" was filed more than four months after the judgment it purports to appeal from was entered. (JA 259). It is therefore untimely and should not be given any weight.

Thus, in choosing to appeal only from the order entered

July 7, 1975, plaintiff has not preserved for review either the issue of whether Judge Frankel properly refused to recuse himself or the issue of whether there was a triable issue of fact to preclude the grant of summary judgment. The sole issue which plaintiff has theoretically preserved on this appeal is whether Judge Frankel clearly abused his discretion in denying plaintiff's Rule 60(b) motion to vacate the order of June 9 and the judgment entered thereon June 11, 1975. Hines v. Seaboard Air Line Railroad Company, 341 F.2d 229 (2d Cir. 1965); Nederlandsche Handel-Maatschappij, N.V. v. Jay Emm, Inc., 301 F.2d 114 (2d Cir. 1962); 7 Moore's Federal Practice ¶60.19 n. 10.1 (2d Ed. 1975).

It is our view that plaintiff's appeal does not specifically deal with this issue, but rather addresses itself to issues which pertain exclusively to the merits of Judge Frankel's order of June 9, 1975. For this reason, we respectfully urge that the appeal be dismissed in its entirety for lack of jurisdiction.

If the Court finds that the issue of abuse of discretion has been properly presented by plaintiff, we respectfully urge that plaintiff's appeal, insofar as it goes beyond this issue and raises issues which relate to the order of June 9 and the judgment entered thereon June 11, 1975, should be dismissed for lack of jurisdiction.

POINT II

JUDGE FRANKEL DID NOT ABUSE HIS DISCRETION IN DENYING PLAINTIFF'S MOTION TO VACATE

It is well established in this Circuit that an order denying a motion to vacate will not be reversed unless it can be demonstrated that the District Court Judge clearly abused his discretion in denying the motion. West v. Gilbert, 361 F.2d 314, 316 (2d Cir.), cert. denied, 385 U.S. 919 (1966); Hines v. Seaboard Air Line Railroad Company, 341 F.2d 229, 231 (2d Cir. 1965); Nederlandsche Handel-Maatschappij, N.V. v. Jay Emm, Inc., 301 F.2d 114 (2d Cir. 1962); Parker v. Broadcast Music, Inc., 289 F.2d 313, 314 (2d Cir. 1961).

It was difficult at the time the motion was made, and, indeed, it is as difficult today to understand on what grounds, if any, plaintiff moved to vacate.* However, as far as we can see, at least for purposes of this discussion,

---

*Rule 60(b) reads in relevant part as follows:

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment..."

plaintiff on its motion argued that:

(a) Judge Frankel should not have granted summary judgment because of the filing of plaintiff's motion for further discovery.

(b) Judge Frankel should not have granted summary judgment because of the filing of plaintiff's application for recusance.

(c) Judge Frankel should have given plaintiff time to respond to the motion for summary judgment since plaintiff purportedly had no obligation to and could not legally submit answering papers once it had requested the Judge to recuse himself.

Presumably it was plaintiff's view on its motion to vacate that because of the above contentions, Judge Frankel's order of June 9, 1975 was a nullity, the product of undue haste, taking plaintiff by surprise. All of this was supposed to fit within the mold of Rule 60(b)*.

*Since it is clearly established that a Rule 60(b) motion may not be used as a substitute for an appeal of the substantive issues which arise out of the order or judgment sought to be vacated, Sampson v. Radio Corporation of America, 434 F.2d 315, 317 (2d Cir. 1970); Wagner v. United States, 316 F.2d 871 (2d Cir. 1963), the merits of Judge Frankel's decision denying the motion for further discovery, refusing to recuse himself and granting summary judgment will not be discussed in this point.

While plaintiff's notice of appeal designates the order denying the motion to vacate as the order appealed from, its brief on appeal contains no argument as to how Judge Frankel abused his discretion in denying the motion, which of course is the only relevant issue which can be raised on this appeal with respect to that order.

In view of the foregoing, we will deal in this Point with only two questions. First, whether Judge Frankel clearly abused his discretion in not vacating the June 9, 1975 order and June 11, 1975 judgment upon a review of plaintiff's contentions described above and second, whether there was a clear abuse of discretion because of the further contention made by plaintiff in its brief that Judge Frankel failed to read or weigh the "proofs" of plaintiff contained in its affidavit on the "merits" which was part of its motion papers (App. Br. 40-41).

A. Judge Frankel properly disposed of plaintiff's motion for further discovery

On May 5, 1975, the News served and filed its motion for summary judgment. (JA 2). Plaintiff was obligated by Judge Frankel's scheduling order to respond by May 19, 1975. (SA 53). On that date, plaintiff, instead of filing opposing papers to the motion for summary judgment, made an independent motion for further discovery and production of documents, returnable on the same day of the motion for summary judgment, May 27, 1975. (JA 2).

According to plaintiff, this motion was made pursuant to authority given in Judge Frankel's letter of May 1, 1975, and memorandum of May 6, 1975. (App. Br. 39). In a letter dated May 3, 1975, Mr. Farrell, plaintiff's attorney, informed Judge Frankel that it intended to make a motion, but did not specify when. (SA 67). A review of Judge Frankel's letter of May 1 makes it clear that it by no means served as "authority" for or 'direction" to Mr. Farrell to make a full blown motion for further discovery on the basis of rights which Judge Carter had purportedly suspended pending the bankruptcy stay. (SA 66).

These "rights" simply did not exist. Judge Carter had unconditionally and unequivocally denied plaintiff further discovery on November 24, 1974, after it had been relieved of the bankruptcy stay. (DSA 75). Additionally, Judge Frankel had already denied plaintiff's motion made March 4, 1975, which sought discovery based on these "rights". (DSA 78).

More importantly, there was nothing in either Judge Frankel's letter of May 1, 1975, or his memorandum of May 6, 1975, which could have been interpreted to mean that an independent discovery motion was to take precedence over the anticipated motion for summary judgment and further delay the trial date in the case. (SA 66, 75-76). To the contrary, Judge Frankel in his memorandum cautioned all counsel about further delays. (SA 75-76).

Plaintiff's action in serving and filing this motion in

lieu of serving and filing its answering papers to defendants' motion for summary judgment, represented not only utter disregard for a court order, but an attempt to completely circumvent the Federal Rules of Civil Procedure. If by May 19, 1975, plaintiff felt it needed more discovery in order to adequately respond to defendants' motion for summary judgment, it should have availed itself of the provisions of Rule 56(f) by submitting an affidavit stating adequate reasons to the court why summary judgment should be refused until further discovery was taken.

In any event, contrary to plaintiff's contentions on its motion to vacate and on this appeal, Judge Frankel, did in fact, consider and dispose of plaintiff's discovery motion in his order of June 9, 1975. In that order Judge Frankel stated:

> "The eventual disposition herein, dismissing plaintiff's complaint, embraces of course a denial of that otherwise grossly tardy and otherwise unmeritorious motion of plaintiff [the May 19, 1975 motion for further discovery]." (JA 89).

Obviously, even for Rule 56(f) purposes, Judge Frankel found plaintiff's motion to be without merit. His decision was fully supported by a record which unequivocally demonstrated that plaintiff had a full opportunity to gather those facts necessary, if they existed, to support the allegations in its

complaint.*

Therefore, Judge Frankel's refusal to vacate the order of June 9, 1975, on the ground that he should have permitted further discovery instead of summary judgment was appropriate and justified in view of the record and certainly did not amount to an abuse of discretion.

B. Plaintiff was obligated to file answering papers to the motion for summary judgment despite its filing of the application for recusance

When it became apparent on the return day of the motion for summary judgment, May 27, 1975, that plaintiff had not submitted papers in opposition to the motion for summary judgment, the Court contacted plaintiff's counsel by telephone. (JA 89). Prior to the return date and the Court's call, plaintiff had made no application for additional time to file opposing papers, papers that had been due on May 19, 1975.

In response to the Court's inquiry, plaintiff's counsel asked for a week to file opposing papers and no mention was made of recusance. (JA 89). Plaintiff was given until May 30, 1975. (JA 89). In effect, plaintiff was given thirteen additional days to file opposing papers without ever seeking such relief

*A full discussion of the merits of Judge Frankel's order denying further discovery and granting summary judgment is discussed in Point IV herein.

itself.

It is obvious, now, however, that plaintiff, for whatever reasons, was determined not to have the summary judgment motion submitted for determination.

Faced with the hard reality of being called upon to respond to the motion, plaintiff's counsel called the Court late on the afternoon of May 29, 1975, stating that he was not going to file opposing papers but instead was going to file an application asking Judge Frankel to recuse himself. (JA 89).

Plaintiff's counsel contends that this announcement had the effect of bringing the entire lawsuit to an immediate standstill. Indeed, on its motion to vacate, plaintiff asserted that, at the moment Judge Frankel was informed that the recusance application was filed, all proceedings should have been frozen, including, of course, plaintiff's obligation to file and serve opposing papers to the motion for summary judgment. (JA 108-114).

The actual filing of the application for recusance is in itself a separate story. While plaintiff stated that it was filing its application for recusance on May 29, 1975, the records of the Clerk's office for District Court disclose that the application was not filed until June 3, 1975. (JA 2, 89). Judge Frankel's independent search for the application indicated it was nowhere to be found in the Courthouse on June 2, 1975. (SA 78;

JA 89). Since defendants were never served with the application for recusance*, only plaintiff's counsel knows what caused the delay in filing. Typically, he provides no clear explanation.

Plaintiff's contention that the mere announcement of its intention to file an application for recusance had the effect of "freezing" this litigation is not worthy of discussion. What is important is that the actual filing of an application for recusance when it finally occurred did not have the effect which plaintiff now ascribes to it.

It is well established that under the recusance statutes, 28 U.S.C. §§144 and 455, the mere filing of an affidavit of disqualification does not automatically disqualify a District Court Judge; it simply requires that the judge pass upon the legal sufficiency of the affidavit submitted. United States v. Townsend, 478 F.2d 1072 (3d Cir. 1973); Undersea Eng. & Const. Co. v. International Tel. & Tel. Corp., 429 F.2d 543 (9th Cir. 1970); Albert v. United States District Court for W.D. of Mich., 283 F.2d 61 (6th Cir. 1960), cert. denied, 365 U.S. 828 (1961); Behr v. Mine Safety Appliances Co., 233 F.2d 371 (3d

*Plaintiff contends that it was not obligated to serve its party adversaries with the recusance application. In the absence of any provision in 28 U.S.C. §§144 and 455, it would seem evident that service was governed and required by Rule 5 of the Federal Rules of Civil Procedure. Plaintiff's attempt to seek the recusance of Judge Frankel without notice to its adversaries was another instance of its total disregard for the federal rules.

Cir.), cert. denied, 332 U.S. 842 (1956).

Upon the filing of the application for recusance, plaintiff was not entitled to proceed on the assumption that it need not file its papers in opposition to the motion for summary judgment until some further notice.

All the filing of the affidavit of prejudice in connection with the application required was that Judge Frankel consider its legal sufficiency before making any other determination in the case.

Judge Frankel did even more than he was required. First, he waited patiently for plaintiff to file the application for recusance. (SA 78-79; JA 89-90). Not having received the application by Monday, June 2, 1975, Judge Frankel wrote all counsel that because of the confusion he was putting the trial date off until June 16, 1975. (SA 78-79). Clearly, he had not yet considered the motion for summary judgment. He advised that he would soon turn to it but would give immediate attention to plaintiff's recusance application once he had it before him. (SA 79).

Thus, on June 2, 1975, plaintiff was fully informed that Judge Frankel was about to decide the motion for summary judgment, whether or not opposing papers were filed. Knowing this, plaintiff, if it really wanted to respond, could have requested the Court to

postpone its decision of the motion for summary judgment until after the determination of the application for recusance. Typically, plaintiff remained silent, resting on its own legal conclusion that it had no obligation to respond.

Plaintiff claims it would have waived its right to seek the recusance of Judge Frankel if it had submitted papers in opposition to the motion for summary judgment. (App. Br. 59). This is not so. Plaintiff could only have waived its right to seek the recusance of Judge Frankel if it failed to make the application in a timely manner. Yates v. Manale, 377 F.2d 888 (5th Cir. 1967), cert. denied, 390 U.S. 943 (1968); Galella v. Onassis, 353 F.Supp. 196 (S.D.N.Y. 1972), aff'd in part, rev'd in part on other grounds, 487 F.2d 986 (2d Cir. 1973). Moreover, under the revised §455, waiver may only be effected "provided it is preceded by a full disclosure on the record of the basis for disqualification".

There is absolutely no authority which we have found in the relevant statutes or in the case law for the proposition that the filing of papers in opposition to a motion for summary judgment would have waived any right to be heard on the question of recusance. Indeed, a reading of Judge Frankel's June 2, 1975 letter makes it clear that he would never have considered plaintiff's submission of opposition papers as a waiver of its right to seek his recusance from the case. (SA 79).

C. Judge Frankel proceeded correctly in disposing of the recusance application and in denying the motion to vacate

Six days after receiving the recusance appplication, with numerous opportunities afforded plaintiff to answer and with plaintiff's full awareness that the motion for summary judgment would be decided in the absence of opposing papers, Judge Frankel denied the recusance application and granted summary judgment in favor of defendants. (JA 84-94). In view of the events leading up to Judge Frankel's order of June 9, 1975, it hardly could have come as a surprise to plaintiff.

Contrary to plaintiff's continuous assertion both on the motion to vacate and on this appeal, Judge Frankel clearly considered and decided the recusance application before making any other decision. A reading of the memorandum and order of June 9, 1975, conclusively demonstrates that Judge Frankel first considered and disposed of the application for his recusance and then went on to decide the motion for summary judgment. (JA 90-91). Plaintiff's reading of the order to achieve an opposite interpretation simply has no basis in objective fact.

There is nothing in the record which would support the conclusion that Judge Frankel committed any procedural errors in disposing of the application for recusance or abused his discretion in not giving plaintiff even more time to file opposing papers to the motion for summary judgment.

Judge Frankel was entitled to presume that plaintiff was familiar with the Federal Rules and the case law supporting those Rules.*

He had given plaintiff several opportunities to file opposing papers to the motion for summary judgment. On June 9, 1975, he acted. There was no reason for him to reverse himself a month later. The contents of plaintiff's motion to vacate fortified the fact that he was right in his initial dispositions.

D. Judge Frankel properly treated the affidavit on the "merits" submitted in connection with the motion to vacate

Plaintiff cannot support its charge that Judge Frankel did not consider and weigh the affidavit on the "merits" submitted by plaintiff as part of its motion to vacate.

The fact that Judge Frankel chose not to include any reference to it in his order dated July 3, 1975, cannot be viewed as proof of a failure to have considered the affidavit. Findings of fact and conclusions of law are not necessary for cases arising

*Even if plaintiff claimed on its motion, which it did not, that it was mistaken or ignorant as to the effect of its filing of the recusance application on its obligation to answer the motion for summary judgment, Judge Frankel still would have properly exercised his discretion in denying the motion. This Circuit has held that ignorance of the rules or ignorance of the law is not the kind of excusable neglect contemplated by Rule 60(b). United States v. Erdoss, 440 F.2d 1221 (2d Cir.), cert. denied 404 U.S. 849 (1971); Ohliger v. United States, 308 F.2d 667 (2d Cir. 1962); Sears, Sucsy & Co. v. Insurance Company of No. Amer., 392 F. Supp. 398 (N.D. Ill. 1975). See also, Wright & Miller, Federal Practice and Procedure: Civil §2858.

under Rule 60(b). Delzona Corp. v. Sacks, 265 F.2d 157 (3d Cir. 1959).

It is plain that the reason Judge Frankel chose not to write a more lengthy opinion than he did was because he viewed plaintiff's motion as totally groundless, presenting utterly no sufficient reason, either in law or in fact, which would compel vacating the order of June 9, 1975.

This affidavit on the "merits" did not require extensive scrutiny before its worthlessness became obvious. As more fully discussed in Point V herein, it was filled with the same kind of speculation, suspicion and conclusory allegations which led to the grant of summary judgment in the first instance. (JA 146-225). Moreover, the affidavit was totally insufficient for purposes of Rule 56(e) in that it was inundated with hearsay on top of hearsay -- clearly evidence which would not have been admissible at trial. Liberty Leasing Co. v. Hillsum Sales Corp., 380 F.2d 1013, 1015 (5th Cir. 1967); Universal Film Exchanges, Inc. v. Walter Reade, Inc., 37 F.R.D. 4, 5-6 (S.D.N.Y. 1965).

Even if it can somehow be shown that Judge Frankel did not fully consider the affidavit on the "merits", there is nothing either in the Federal Rules or cases which would have required Judge Frankel to have considered the affidavit in the same manner he would have, had the affidavit been submitted as a timely response to defendants' motion for summary judgment.

In contradiction of Rule 56(e), in violation of Local Rule 9(g) and in violation of Judge Frankel's order, plaintiff never submitted a timely affidavit or any statement in opposition to defendants' moving papers.* As more fully discussed in Points IV and V herein, Judge Frankel acted completely within his authority and discretion pursuant to Rule 56(e) and Local Rule 9(g) in granting summary judgment despite the absence of opposing papers. Smith v. Mack Trucks, Inc., 505 F.2d 1248, 1249 (9th Cir. 1974); Kirk v. Home Indemnity Company, 431 F.2d 554, 560 (7th Cir. 1970); Miller v. Western Board of Adjusters, Inc., 427 F.2d 175, 176 (9th Cir. 1970); Pace v. Southern Express Co., 409 F.2d 331, 334 (7th Cir. 1969); Thompson v. Evening Star Newspaper Company, 394 F.2d 774, 777 (D.C. Cir.), cert. denied, 393 U.S. 884 (1968); Foy v. Norfolk and Western Railway Company, 377 F.2d 243, 247 (4th Cir.), cert. denied, 389 U.S. 848 (1967).

*Rule 56(e) provides in relevant part as follows:

"...When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Local Rule 9(g) provides in relevant part as follows:

"...The papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried.

All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party."

Moreover, contrary to plaintiff's persistent contention, Judge Frankel's grant of summary judgment was on the merits and was not a default judgment. As discussed in Point IV herein, Judge Frankel's order of June 9, 1975, was predicated on the full record before him which beyond defendants' submissions, consisted of the pleadings, interrogatories and answers thereto, as well as the deposition transcripts of key parties.* Though indeed plaintiff defaulted in the sense it chose not to submit responding papers, Judge Frankel was not precluded in this context from awarding defendants judgment on the merits Kirk v. Home Indemnity Company, supra, at 560; Pace v Southern Express Co., supra, at 334.

Having awarded summary judgment on the merits June 9, 1975, Judge Frankel clearly did not abuse his discretion if he did not consider plaintiff's affidavit on the "merits" finally submitted 21 days after the entry of judgment. (JA 2). Once summary judgment is awarded in the absence of opposing papers, it is firmly established that a District Court Judge's rejection of a later submission is not an abuse of discretion under Rule 56 or Rule 60(b). Applegate v. Top Associates, Inc., 425 F.2d 92, 94-95 n. 5 (2d Cir. 1970); Thompson v. Evening Star Newspaper Company, supra, at 777; Foy v. Norfolk and Western Railway Company, supra, at 246; Englehard Industries, Inc. v. Research Instrumental Corp., 324 F.2d 347, 352 (9th Cir. 1963); Smith v. Stone, 308 F.2d 15, 18

*See pp. 60 to 62 of this brief.

(9th Cir. 1962); Clarke v. Montgomery Ward & Company, 298 F.2d 346, 349 (4th Cir. 1962).

As this Court stated in Applegate v. Top Associates, Inc., supra, at 94-95 n. 5, a party, as plaintiff here, cannot "pick the time or place for disclosures".

In view of the foregoing, Judge Frankel's order dated July 3, 1975, and entered July 7, 1975, should be affirmed. For the reasons set forth in Point I of this brief, the balance of plaintiff's appeal should be dismissed.

If this Court finds that it has jurisdiction to review the merits of Judge Frankel's decisions of June 9, 1975, Points III, IV and V which follow will demonstrate that Judge Frankel was correct in denying plaintiff's application for recusance and in granting summary judgment dismissing the complaint in this action.

POINT III

JUDGE FRANKEL CORRECTLY DENIED PLAINTIFF'S APPLICATION FOR RECUSANCE

Beyond the fact that the application for recusance was filed in a context which strongly suggests that plaintiff was using this serious procedure as a device to further delay the prosecution of its lawsuit, the application claimed by plaintiff to have been filed in the late afternoon of May 29, 1975, the day before plaintiff had been ordered to submit answering papers to defendants' motion for summary judgment (but actually filed on June 3, 1975, according to the records of the Clerk's office), was utterly devoid of merit and without any legal sufficiency. (JA 2, 89-90).*

This Circuit has succinctly stated in Rosen v. Sugarman, 357 F.2d 794, 797-798 (2d Cir. 1966), the applicable principles of law governing the disposition of affidavits for disqualification of Federal District Court Judges pursuant to 28 U.S.C. §144:

> "...Although the facts stated in the affidavit are to be taken as true, the judge may inquire into their legal sufficiency.

*Plaintiff filed an application seeking the withdrawal of Judge Frankel on June 3, 1975. (JA 2). This application was denied as an initial matter in Judge Frankel's order of June 9, 1975. (JA 90-91). Plaintiff then made a second application for recusance which was attached to the first part of its motion to vacate dated June 17, 1975. (JA 116-125). Judge Frankel denied the second application in a separate order filed June 24, 1975. (JA 226). It is our contention that plaintiff has not properly brought up the denial of the second application dated June 17, 1975, for review by this Court, since it is not specifically appealed from. Moreover, it is our contention that the second application was grossly untimely and should not be afforded any consideration by this Court. However, for purposes of this discussion only, in applying the applicable legal principles, we will assume, but not concede, that both applications are properly before this Court for review.

> Indeed he must do so. There is 'as much obligation upon a judge not to recuse himself when there is no occasion as there is for him to do so when there is', In re Union Leader Corp., 292 F.2d 381, 391 (1st Cir.), cert. denied, 368 U.S. 927, 82 S. Ct. 361, 7 L. Ed. 190 (1961); ...To be sufficient an affidavit must show 'the objectionable inclination or disposition of the judge'; it must give 'fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment.' [Berger v. United States], 255 U.S. at 33-35, 41 S. Ct. at 233."

Even taking the various allegations contained in plaintiff's affidavits of bias and prejudice as true, they manifestly fail to demonstrate, as a matter of law, that Judge Frankel possessed such "a bent of mind" as should have compelled his disqualification from this case. There is no question that what lies at the heart of plaintiff's attorney's allegations was plaintiff's counsel's purported feeling of "discomfort" with Judge Frankel. (JA 73; App. Br. 37). Apparently, these feelings of "discomfort" revolved around counsel's perception that he was being pressed with the obligation to respond to defendants' motion for summary judgment which he viewed as inappropriate. (JA 73; App. Br. 37).

However, the law in this Circuit is clear that subjective feelings of counsel, without more, cannot constitute the basis for disqualification. Wolfson v. Palmieri, 396 F.2d 121, 125 (2d Cir. 1968).

A proper affidavit in support of an affidavit for

recusance must go further than mere assertions of subjective feelings of "discomfort". Therefore, an affidavit in support of an application for recusance, unlike the affidavits submitted in this case, must be specific in setting forth objective facts including the time, place, persons and circumstances of the events which purportedly constitute the predicate for disqualification. Hodgson v. Liquor Salesmen's Union Local No. 2 of State of N.Y., 444 F.2d 1344, 1348 (2d Cir. 1971); Wapnick v. United States, 311 F. Supp. 183, 184-[illegible] (E.D.N.Y. 1969), cert. denied, 400 U.S. 845 (1970). It is only the objective facts presented in an affidavit which are relevant, not the conclusory allegations of the attorney. Hodgson v Liquor Salesmen's Union Local No. 2 of State of N.Y., supra.

Moreover, the factual allegations must be shown to be personal in nature as opposed to judicial. In this sense, the factual allegations must refer to an attitude or disposition which is extrajudicial in origin. Wolfson v. Palmieri, supra, at 124. Essentially, what Mr. Farrell pointed to in both his affidavits as indicative of the purported prejudice and bias against him were certain rulings of Judge Frankel. (JA 70-74, 116-124). These are precisely the kinds of allegations which have been repeatedly found to be legally defective. In Rosen v. Sugarman, supra, at 798, this Circuit held that "a judge is not to be faulted as biased or prejudiced because he had considered that the effective discharge of his responsibility over proceedings

before him...has demanded the consistent rejection of an attorney's contentions or strong measures to prevent what he regards as inexcusable wastes of time". See also, Mirra v. U.S., 379 F.2d 782, 788 (2d Cir.), cert. denied, 389 U.S. 1022 (1967); Plaquemines Parish School Board v. United States, 415 F.2d 817, 825 (5th Cir. 1969); Botts v. United States, 413 F.2d 41, 44 (9th Cir. 1969); Bumpus v. Uniroyal Tire Co. Division of Uniroyal, Inc., 385 F. Supp. 711, 714 (E.D. Pa. 1974).

Similarly, in Botts v. U.S., supra, at 44, the Ninth Circuit held that:

> "The judge's demeanor and rulings in earlier phases of this litigation may provide the basis for a claim of error on appeal. They do not, however, provide a basis for disqualification."

Any objections that plaintiff may have had to certain rulings of Judge Frankel could have been made the subject of an appeal, but clearly did not constitute that type of extrajudicial, personal bias which is uniformly required for the disqualification of a Federal District Court Judge.

Plaintiff also referred in his affidavits to certain "hostile" comments directed to him by Judge Frankel.* Simple

*In plaintiff's view these "hostile" comments were contained in Judge Frankel's May 6, 1975, memorandum directing counsel for both sides to cease a "barrage of letter correspondence". (JA 73; SA 75).

analysis of Judge Frankel's memorandum opinions and letters to counsel make it clear that any statements contained therein did not reflect any specific antipathy toward plaintiff much less an antipathy that had "crystallize[d] to a point where the attorney [for the plaintiff] could do no right..." Rosen v. Sugarman, supra, at 798. If anything, the only conclusion that can be derived from Judge Frankel's statements in both his memorandum and correspondence to counsel was that they indicated a justifiable impatience with the protracted nature of the proceedings in the case and a desire to expedite a final determination of the case under the Southern District's Plan for the Reallocation and Disposition of Three-Year Old Civil Cases. (JA 86). Impatience of this kind is simply not sufficient to demonstrate personal bias or prejudice. Rosen v. Sugarman, supra, at 798. We hasten to add, however, that in our view Judge Frankel did not exhibit impatience. His promptings to proceed quickly, which were as much directed to defendants as they were to plaintiff, were balanced by a very careful consideration of all requests of the parties.

As pointed out in Point II herein, the record will show that Judge Frankel's treatment of plaintiff, despite plaintiff's persistent disobedience of the Federal Rules and court orders, was far from short tempered. He acted with great restraint in not immediately dismissing plaintiff's complaint when plaintiff failed to comply with both the Federal Rules and Judge Frankel's

order by deliberately choosing not to file its opposing papers to the motion for summary judgment by May 19, 1975, much less the return date of the motion. This same restraint was evidenced when he waited patiently for the filing of the application for recusance once plaintiff's attorney announced his intention to file it. (SA 78-79; JA 89).

Finally, plaintiff's position with respect to recusance is in no way enhanced or aided by the invocation of the recently amended paragraph (a) of §455 of 28 U.S.C. which provides the following:

> "Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

In its report on the Act amending §455(a), the House Judiciary Committee stated the following:

> "...Disqualification for lack of impartiality must have a reasonable basis. Nothing in this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a 'reasonable fear' that the judge will not be impartial. Litigants ought not to have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice..." H.R. Rep. No. 93-1453, 93rd Cong. 2d Session. 3 U.S. Code Cong. and Admin. News at 6355 (1974) (emphasis added).

Plaintiff's subjective feelings of "discomfort" with

Judge Frankel, which are not supported by any judicially recognizable objective facts is precisely the "litigant's feeling that a judge may decide a question against him" which was rejected by the House Judiciary Committee as a basis for disqualification under 28 U.S.C. §455. To hold here that plaintiff's subjective feelings compel disqualification under 28 U.S.C. §455 would in effect overrule all prior decisions of this Court on disqualification and would turn the procedure into a device for wholesale judge shopping and judiciary delay.

Given the record of this case, it is respectfully submitted that it was for precisely the latter purpose that plaintiff attempted to recuse Judge Frankel at the last minute. It is well established that "it is the duty of the judge not to permit the use of an affidavit of prejudice as a means to accomplish delay and otherwise embarrass the administration of justice". United States v. Orbiz, 366 F. Supp. 628, 631 (D. Puerto Rico 1973). See also, United States v. Newman, 481 F.2d 222 (2d Cir.) cert. denied, 414 U.S. 1007 (1973); United States v. Birrell, 276 F. Supp. 798 (S.D.N.Y. 1967).

In view of the foregoing, Judge Frankel's denial of plaintiff's application for recusance should be affirmed.

POINT IV

SUMMARY JUDGMENT WAS A PROPER REMEDY ON THE RECORD BELOW

This point will concern itself with the record below and the events which led to Judge Frankel's order of June 9, 1975, granting summary judgment and dismissing the complaint in this action. The merits of the motion for summary judgment will be discussed in Point V herein.

A. The history and results of discovery in this action

On the eve of trial this action stood in a posture uniquely appropriate for summary disposition.

At an earlier stage of the litigation, the News propounded interrogatories to plaintiff which sought the factual basis of the conclusory allegations of the complaint. (DSA 11-33, 95). The answers to these interrogatories disclosed that plaintiff had no knowledge of facts which would support any of the material allegations of wrongdoing in its complaint. (DSA 95; JA 6-8). Near the end of this lawsuit, the News propounded a second set of interrogatories to determine if plaintiff had developed any factual basis for its claims. (DSA 36-50, 96-99). The answers disclosed it had not. (JA 10-14; DSA 96-99).

Plaintiff had deposed eight persons it believed were active in and key to the conspiracy alleged in the complaint.

(DSA 93-94). It propounded interrogatories to the News which were answered by its late publisher, Francis M. Flynn. (DSA 60-74, 99-100). These discovery proceedings produced nothing in the way of evidence to support the allegations in the complaint. (JA 95-102).

1. Interrogatories Served By the News and Plaintiff's Answers Thereto

The interrogatories served by the News had the purpose of seeking from plaintiff all facts within plaintiff's knowledge which would support its claim that the News was involved in a conspiracy to violate the antitrust laws, and more specifically that such alleged participation was effectuated through a disruption of distribution of the Mirror and the diversion of advertising from that paper. (DSA 11-33, 95). However, in its answers to the News' first set of interrogatories of April 6, 1971, which was only answered under a threat of dismissal for lack of prosecution more than two years after they were served, plaintiff stated in essence that it was unaware of any facts to support the central allegations of its complaint and it would have to obtain such information from defendants. (DSA 95; JA 6-8).

On February 4, 1975, the News served a second set of interrogatories. (DSA 36-50, 96-99). Plaintiff's answers thereto were served after the completion of all depositions other than those conducted in the month of April, 1975. (DSA

96). However, the answers given to this set of interrogatories were substantially the same. (DSA 96-99; JA 6-8).

Plaintiff, for example, could not provide any particulars with respect to alleged meetings or conferences pursuant to the alleged conspiracy. (DSA 39-40; JA 11). In its answers to interrogatories, it only stated that there were meetings and named Jack Underwood of the News, Edward I Maher, Esq., James W. Rodgers, Esq., and James Lynch as those associated with the News who were at said meetings. (JA 11). Depositions were taken of Mr. Underwood, Mr. Maher and Mr. Rodgers, the latter two being members of this law firm. (DSA 93-94). Those depositions contained no testimony that any meetings in furtherance of a conspiracy ever occurred. (DSA 100-101). Mr. Lynch supplied an affidavit in connection with the motion for summary judgment which denied involvement in a conspiracy and pointed out that he was in Chicago and no longer employed by the News at the time of the alleged conspiracy. (DSA 110-111).

2. Plaintiff's Interrogatories to the News and the Answers Thereto

The interrogatories addressed to the News which were answered by Mr. Flynn related primarily to the News' acquisition of certain assets of the old "New York Mirror" from the Hearst Corporation and appeared to have no relevance with respect to proof of any conspiracy. (DSA 99-100). These interrogatories

were objected to. Plaintiff never moved to compel answers. The balance of the interrogatories elicited no meaningful facts which would support plaintiff's claim. (DSA 60-74).

3. The Depositions Taken by Plaintiff

There would be little value in attempting to summarize all of the depositions taken by plaintiff, but one thing is clear -- the deposition transcripts do not contain the slightest morsel of evidence which could even suggest that a conspiracy existed among the defendants. A few highlights warrant specific mention:

(a) Mr. Garfinkle's testimony revealed that he never had any conversations with anyone at the News about the Daily Mirror. During one conversation with Jack Underwood on a completely unrelated subject, Mr. Underwood incidentally asked how the Mirror was doing. This conversation took place after the Mirror had been removed from the Ancorp newsstands. (DSA 137-141, 144-157).

(b) The depositions of Mr. Maher and Mr. Rodgers, members of this law firm, revealed no conversations concerning the Mirror with any of the Ancorp defendants. (DSA 101).

(c) The depositions of Mr. McCollough, President of Ancorp and Mr. Levine, an employee of Ancorp, revealed no conversations concerning the Mirror with anyone associated with the

News. (DSA 177-181, 192).

(d) The deposition of Archie Gordon contained no probative evidence at all. (DSA 101). Despite the fact that plaintiff's counsel complained about the supposed inaccessibility of Mr. Gordon for two years, when he finally took the deposition, he asked only ten minutes of questions -- none of which were directed to the critical area in which Mr. Gordon had some knowledge -- the reason why the Mirror was removed from Ancorp's newsstands. (DSA 101). Mr. Gordon's affidavit was submitted in connection with defendants' motion for summary judgment. (DSA 112-115).

(e) In his deposition, Harry Kane, Assistant Circulation Director of the News, emphatically denied any practice of giving free copies of the News to news dealers to promote sales. (DSA 172). Two internal documents were produced at the deposition which indicated that the News did monitor sales of the Mirror for a period of time, a practice, as was explained, which was a general business practice. (DSA 158-172).

B. The News' submissions on its motion for summary judgment were a proper and compelling predicate for Judge Frankel's order of June 9, 1975

On May 5, 1975, the News, pursuant to the schedule set forth by Judge Frankel, submitted its papers in support of its motion for summary judgment. (JA 2; SA 53). The papers consisted

of the affidavits of Mark D. Geraghty, Esq., Daniel Rauch, James J. Lynch, Archie Gordon and Jeffrey A. Shuman, Esq., an Appendix of Exhibits and a Memorandum of Law. (JA 2; DSA 81-116). Of course, all pleadings and other papers filed in the action, including the deposition transcripts, interrogatories and answers were before the Court.

Thus, contrary to the assertions of plaintiff, the motion was not made on the bare affidavit of an attorney. The affidavit of Mark D. Geraghty, Esq., counsel for the News, served as a directory for the Court so that it could evaluate the record of discovery in the litigation.* (DSA 87-107). As can be seen, this is a far cry from those cases where the only affidavit submitted in support of a motion for summary judgment was that of an attorney who had no personal knowledge of key events and where there was no record of discovery.

In this case, besides the affidavits of the attorneys for the News and for Ancorp (Jeffrey A. Shuman, Esq.), there were affidavits of those who were accused by plaintiff of being actual conspirators, i.e., James J. Lynch and Archie Gordon. (DSA 110-111, 112-115). There were affidavits of those who had personal knowledge of the underlying facts of the very event

*Mark D. Geraghty, of course, had personal knowledge of all discovery proceedings. (DSA 87).

which undoubtedly triggered the lawsuit in the first instance -- the removal of the Mirror from Ancorp's newsstands, i.e., Archie Gordon and Daniel Rauch. (DSA 108-109, 112-115). Moreover, the deposition testimony and answers to interrogatories of purportedly key figures in the alleged conspiracy were before Judge Frankel at the time the motion was decided. Certainly, in this context, the affidavit of Mr. Geraghty was both appropriate and of probative value to the court's determination. Grenader v. Spitz, 390 F. Supp. 1112, 1116 (S.D.N.Y. 1975).

C. Plaintiff's motion dated May 19, 1975, for further discovery was properly denied

Rather than oppose defendants' motion for summary judgment, plaintiff served an independent motion for further discovery and production of documents on the same date. (JA 28-38). The motion was denied by Judge Frankel in his order of June 9, 1975 wherein he held that the motion was "grossly tardy and otherwise unmeritorious". (JA 89).

As discussed in Point II herein, the motion purported to be made pursuant to the "authority" and "direction" of Judge Frankel's letter of May 1, 1975, and memorandum of May 6, 1975. A reading of those documents demonstrates the frivolous nature of that position. Almost precisely the same motion had been made in 1974 and had been denied on November 18, 1974 by Judge Carter. (DSA 75). It was renewed in March, 1975 and had been denied on

March 26, 1975 by Judge Frankel. (DSA 76-78).

Moreover, Judge Frankel permitted the taking of three depositions sought in the motion papers. (SA 44). They were taken in April, 1975. (DSA 94).

Plaintiff had four years within which to conduct its discovery and gather any evidence which may have existed to support the allegations in its complaint. Its attempt to shift its chronic delay on the News or other defendants borders on being disingenous. (SA 54-62; App. Br. 10). The bankruptcy stay, in which the News had no participation whatever, delayed plaintiff, at most, only three months. (SA 59). Clearly, plaintiff would have gone on indefinitely with its harassing and unproductive discovery, had not Judge Frankel finally put a stop to it.

Therefore, it was certainly within the proper exercise of Judge Frankel's discretion to deny a motion for further discovery. Cf. Sanden v. Mayo Clinic, 495 F.2d 221 (8th Cir. 1974); Tiedman v. American Pigment Corp., 253 F.2d 803 (4th Cir. 1958); Dolgow v. Anderson, 53 F.R.D. 661 (E.D.N.Y. 1971). The propriety of his decision becomes even more apparent in view of the fact that plaintiff had already been afforded a full opportunity to conduct discovery and was in a position to use the procedure made available to it under Rule 56(f).

D. Summary judgment on the merits was proper despite the absence of opposing papers

Plaintiff never submitted opposing papers to defendants' motion for summary judgment by May 19, 1975 (the date originally ordered) or by May 27, 1975 (the return date) or by May 30, 1975 (the date ultimately ordered by Judge Frankel). (SA 53; JA 88-89). Nor did plaintiff ever file, even with its untimely affidavit on the "merits", a statement pursuant to Local Rule 9(g). (JA 146). Plaintiff's actions in this regard contradicted the provisions of 56(e), violated Local Rule 9(g) and violated Judge Frankel's order.

The simple and only conclusion that can be drawn from all of this is that plaintiff deliberately chose not to submit answering papers because it could not meet defendants' contentions and because it hoped to further delay the disposition of its case.

In view of defendants' submissions and the record in the case, plaintiff's failure to respond was tantamount to reliance on its pleadings to create an issue of fact. On this ground alone, summary judgment could have properly been granted. Smith v. Mack Trucks, Inc., 505 F.2d 1248, 1249 (9th Cir. 1974); Kirk v. Home Indemnity Company, 431 F.2d 554, 560 (7th Cir. 1970); Miller v. Western Board of Adjusters, 427 F.2d 175, 176 (9th Cir. 1970); Pace v. Southern Express Company, 409 F.2d 331, 334 (7th Cir. 1969); Thompson v. Evening Star Newspaper Co., 394 F.2d 774, 777 (D.C. Cir. 1968); Foy v. Norfolk and Western Railway Company,

377 F.2d 243, 246 (4th Cir. 1967).

However, since Judge Frankel had the full record of the case, including depositions and answers to interrogatories before him at the time he decided defendants' motion, he was in a position to fully evaluate the posture of the case and to determine that no issue of material fact existed to preclude dismissal of the co laint. In this context, Judge Frankel's grant of summary judgment on the merits, as opposed to default, notwithstanding the absence of opposing papers, was both proper and warranted. Kirk v. Home Indemnity Company, supra, at 560; Pace v. Southern Express Co., supra, at 334.

POINT V

SUMMARY JUDGMENT WAS REQUIRED AND SHOULD BE AFFIRMED

A. Plaintiff's affidavit on the "merits" should not be considered in connection with a review of Judge Frankel's determination

In dealing with the merits of the decision granting summary judgment, plaintiff's affidavit on the "merits" submitted to the District Court twenty-one days after the date judgment was entered (JA 2) is not entitled to the same consideration it would have received had it been submitted prior to final adjudication. It is well established that affidavits which are submitted after judgment and which are not before the District Court at the time summary judgment is granted are not before a Court of Appeals for purposes of its review of the merits of the judgment below. Garcia v. American Marine Corp., 432 F.2d 6, 8 (5th Cir. 1970); Marion County Cooperative Ass'n v. Carnation Co., 214 F.2d 557, 562 (8th Cir. 1954); Hackner v. Morgan, 130 F.2d 300, 301 (2d Cir. 1942).

However, even if the tardiness of its filing is ignored and the affidavit is treated as plaintiff's opposition to the motion for summary judgment, it is completely defective in that it contains no evidentiary facts which would be admissible at a trial.

In a rambling, confused manner, the affidavit presents

a swamp of conclusory allegations, personal conjecture, and hearsay piled on top of hearsay.

For example, in an apparent attempt to link the News with plaintiff's purported difficulties with defendants Ancorp and Garfinkle, the affidavit of Philip S. Budin relates a conversation he allegedly had with Roy Cohn, Esq. (JA 175-177).* According to the account, Mr. Cohn told Mr. Budin that Mr. Levine had just told him that Mr. Garfinkle had told him that "the real reason the Mirror could not be put on the Union News stands -- was the Daily News". The absurdity of this multiple hearsay is even further enhanced when Mr. Farrell retells the entire story in the body of his own affidavit from what Mr. Budin had purportedly told him. (JA 160-162).

Plaintiff's conclusory allegations with respect to the News agreement with the Hearst Corporation in 1963 are equally deficient in that they have absolutely no relevance to this lawsuit which alleges a conspiracy in 1971-1972 to drive plaintiff out of business. (JA 151-153; App. Br. 20-24). It is undisputed that plaintiff never had any connection with the Hearst Corporation's "New York Mirror". (JA 6, 10). Certainly, the 1963

*It is interesting to note that this alleged conversation which allegedly took place after the action was instituted (App. Br. 29-30) was never referred to in either set of plaintiff's answers to interrogatories and was only mentioned for the first time in plaintiff's affidavit on the "merits". (DSA 20-26, 43-45; JA 6-14).

agreement in which the News purchased various assets of the Hearst's "New York Mirror" and in which the Hearst Corporation covenanted not to compete with the News for a ten year period was not illegal on its face, and cannot, standing alone, provide an inference of an anticompetitive intent, much less a conspiracy to drive plaintiff out of business in 1971-1972*. In fact, it is impossible to comprehend how plaintiff can complain either of the agreement or the covenant not to compete which is contained in the agreement. If anything, the covenant not to compete and the agreement between the Hearst Corporation and the News benefited, not harmed, plaintiff in its attempt to gain entry in the market.

The total absence of any connection between the Hearst agreement and the allegations in this lawsuit is in no way diminished by the letters sent to plaintiff in 1965 and 1971 by the News' attorneys advising of the possibility of legal action -- which in fact was never instituted. (DSA 173-176; JA 433-435; App. Br. 23-24). Both letters reflected legitimate efforts by the News to protect interests the News had acquired in the 1963 agreement. In 1965 (when plaintiff very briefly commenced publication of the Mirror during a strike), the News' counsel sought to protect the trademark "Mirror". (DSA 173-174). In 1971 (when

*Cf. United States v. Addyston Pipe & Steel Co., 85 F. 271, 281-283 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899); United States v. Empire Gas Corporation, 393 F.Supp. 903, 913-915 (W.D. Mo. 1975); Sound Ship Building Corp. v. Bethlehem Steel Corp., 387 F.Supp. 252, 255 (D.N.J. 1975).

plaintiff commenced publication on a regular basis) the News' counsel only sought to protect the promotional program known as the "Post Position" which the News had actually utilized itself for a period of time. (DSA 175-176; JA 428). Quite obviously, if the News was intent on driving plaintiff out of business, it would have taken legal steps beyond the writing of a letter.

Though the affidavit on the "merits" is thoroughly defective and should not receive any consideration, its contents demonstrate one major point: Having taken a belated opportunity to do so, plaintiff was still unable to make a cogent presentation of any issue of material fact or of any evidence to support the conclusory allegations contained in its complaint.

B. Plaintiff had failed to demonstrate the existence of factual evidence by the eve of trial and at the time summary judgment was granted, there were no issues of triable fact

Despite the broad allegations in the complaint, the thrust of plaintiff's discovery was directed to the single issue of the Mirror's inability to gain distribution on those newsstands owned and operated by defendant, Ancorp. (DSA 102-105). There was no inquiry whatever by plaintiff which would shed any light on those allegations which pertain to the alleged exertion of pressure on distribution points, other than those of Ancorp, or the alleged diversion of advertising away from the Mirror.

(DSA 105-106). Further, aside from the vague and conclusory reference in the complaint with respect to monopolization, there was utterly no development of that allegation either in the interrogatories or in the depositions.

Therefore, the only factual evidence which plaintiff would have been able to present at trial, revolved exclusively around the allegation that there was an agreement among defendants not to distribute or sell the Mirror from the newsstands owned or operated by Ancorp. The facts pertaining to this issue, particularly insofar as the News is concerned, are as follows:

(a) That the Mirror was sold from the newsstands owned and operated by Ancorp for a period of approximately one week at the beginning of its publication, and, that thereafter, Ancorp did not sell the Mirror from its newsstands. (DSA 108-109, 186; JA 92).

(b) That Garfinkle and Jack Underwood, Assistant Secretary and Director of Circulation of the News, although having met socially on several occasions, never had any communications concerning the Mirror with the exception of one passing question in the course of a telephone call initiated by Garfinkle, in which Underwood asked how the Mirror was doing. This conversation took place after the Mirror had been removed from the Ancorp newsstands. (JA 273-281; DSA 137-140).

(c) That William McCollough, President of Ancorp and Underwood met on a few social occasions and communicated from time to time with respect to the circulation of the News on Ancorp's newsstands. (DSA 142, 183-185).

As to the foregoing facts, there is no dispute. However, it is readily apparent that these facts could never lead to a reasonable conclusion or inference that the removal of the Mirror from the Ancorp newsstands was the product of a conspiracy between the defendants to eliminate plaintiff as a competitor of the News. Indeed, a contrary conclusion is not only more plausible, but factually supported by Mr. McCollough, Daniel Rauch, an employee of Ancorp during the relevant period in question, and Archie Gordon, the Mirror's first wholesaler. (DSA 108-109, 112-115, 186-191). From their respective sworn statements, it was plain that Ancorp's refusal to handle the Mirror on its newsstands stemmed from the Mirror's sudden change, after its first week of publication, to a new wholesaler, who offered the newspaper at a higher price than the Mirror's first wholesaler, which price, Ancorp decided, was not justified. (DSA 103-104, 108-109, 112-115, 186-191). Thus Ancorp's decision, which appears to have been the event which triggered this lawsuit, was predicated on economic considerations. (DSA 191). More significantly, the record in this case contains not a single piece of evidence

from which one could infer, much less prove, that the News had any involvement of any nature with Ancorp's decision. (DSA 105-106, 108-109, 112-115, 186-192).

Apart from the foregoing facts, plaintiff continues to contend, even here on appeal, as it had in its answers to both sets of the News' interrogatories that it has no independent or specific facts within its own knowledge to support the conclusory allegations of conspiracy in its complaint. (App. Br. 65-68). It continues to insist that it can only develop its evidence from facts which are allegedly within the sole knowledge of defendants. (App. Br. 35, 65-68). It is apparent that plaintiff continues to seek a trial in this action without any evidence at its disposal to prove what amounts to nothing more than pure gossamer that its demise was the proximate result of an illegal conspiracy between defendants.

If any antitrust case was ripe for summary judgment, it was this one. There had been full discovery and the parties were on the eve of trial. Yet, as was demonstrated in the record before the court below and on the affidavits filed in support of the motion for summary judgment, plaintiff had no independent or specific facts to support any of the allegations in its complaint. (JA 92-93).

C. Plaintiff cannot rely on the conclusory allegations in its complaint

Plaintiff's position throughout this litigation has been that it has no specific or independent facts within its knowledge to support the allegations of its complaint. It says that such facts were and are solely within the collective knowl- of defendants. (DSA 95-99; JA 6-14). Apparently, this attitude continues to be rooted in its belief that it is entitled to the luxury of forcing defendants to trial, armed only with the hope that through examination of witnesses (most or all of whom it has already examined in depositions) some evidence to support its antitrust claims will surface.

Rule 56(e) of the Federal Rules of Civil Procedure makes it unmistakably clear that plaintiff is not entitled to this luxury and cannot shift the costly burden on defendants to defend against what amounts to, at best, a compilation of suspicions. Indeed, with the filing of the motion for summary judgment, plaintiff was required to come forward, if it was able, (and it is now evident that it could not), with independent and specific facts which would have demonstrated that there were triable issues with respect to the allegations in its complaint. Once a motion for summary judgment is made, an adverse party cannot rest upon the mere conclusory allegations of its complaint, but must demonstrate "specific facts showing that there is a genuine issue for trial". First National Bank of Arizona v. Cities Service Co., 391 U.S. 253,

270 (1968); Modern Home Institute, Inc. v. Hartford Acc. & Indem. Co., 513 F.2d 102, 110 (2d Cir. 1975); ALW, Inc. v. United Airlines, Inc., 510 F.2d 52, 55 (9th Cir. 1975); Coniglio v. Highwood Services, Inc., 495 F.2d 1286, 1292 (2d Cir.), cert. denied, 419 U.S. 1022 (1974); Bushie v. Stenocord Corp., 460 F. 2d 116, 119 (9th Cir. 1972); Tripoli Company, Inc. v. Wella Corporation, 425 F.2d 932, 935 (3d Cir.), cert. denied, 400 U.S. 831 (1970); Daily Press, Inc. v. United Press International, 412 F.2d 126, 128 (6th Cir.), cert. denied, 396 U.S. 990 (1969); Chapman v. Rudd Paint & Varnish Co., 409 F.2d 635, 643 (9th Cir. 1969); Beckman v. Walter Kidde & Co., 316 F. Supp. 1321, 1324 (E.D.N.Y. 1970), aff'd per curiam, 451 F.2d 593 (2d Cir. 1971), cert. denied, 408 U.S. 922 (1972).

It is obvious that a "party cannot raise an issue of fact simply by relying upon the complaint or an affidavit setting forth a bald conclusion that is flatly denied". Beckman v. Walter Kidde & Co., supra, at 1325. A showing of a genuine issue for trial is "the existence of a legal theory which remains viable under the asserted version of the facts and which would entitle the party opposing the motion (assuming his version to be true) to a judgment as a matter of law". Bushie v. Stenocord Corp., Inc., supra, at 119.

Clearly, plaintiff does not meet this requirement. Beyond not even responding, it demonstrated only a total inability

to present anything except bald conclusions. (JA 146-177). Since no facts whatever were developed in all of the discovery which would independently point to the existence of a conspiracy among the named defendants, there are simply no triable issues of fact to preclude dismissal of the complaint.

D. Plaintiff cannot establish the existance of a conspiracy from the facts contained in the record

As in First National Bank of Arizona v. Cities Service Co., supra, plaintiff's major difficulty here is that the issue of fact crucial to plaintiff's case is also an issue of law, namely, the existence of a conspiracy. In order to recover under Section 1 of the Sherman Act, plaintiff would be required to establish (a) that there was a contract, combination or conspiracy, and (b) that such contract, combination, or conspiracy was an undue restraint of trade. House of Materials, Inc. v. Simplicity Pattern Co., 298 F.2d 867 (2d Cir. 1962); Beckman v. Walter Kidde & Co., supra. The second of the Section 1 requirements is not

reached in this case, as it is plain that under any reasonable version of the facts contained in the record there was no conspiracy.

An examination of the record in this action, makes it indisputable that there is no direct proof of any agreement, combination or any arrangement between Ancorp, Garfinkle and the News pertaining to the Mirror in any respect much less a conspiracy to drive it out of business. (DSA 104-105). There are no documents to indicate the existence of the claimed conspiracy. (DSA 105). Witnesses that were examined by plaintiff, not only flatly denied their participation in or knowledge of any conspiracy to destroy plaintiff, but affirmatively indicated that they had no real concern whatever, in their respective capacities, with the publication of the Mirror during its short life span. (DSA 139-140, 144-145, 154, 192).

Nor is there circumstantial evidence from which any inferences could properly be drawn even tending to establish a conspiracy or agreement to drive the Mirror out of business.

Certainly, a conspiracy to drive the Mirror out of business cannot be inferred from the fact that Garfinkle met and communicated with Underwood on a few social occasions during the period in question or that Mr. McCollough and Mr. Underwood communicated with each other infrequently during the same period with respect to the circulatic of the News on Ancorp's newsstands.

(DSA 182-185).

Thus, plaintiff's entire case, beyond the conclusory allegations in the complaint, boils down to whether an inference of illegal conspiracy can be drawn from the fact that Ancorp refused to handle the Mirror on its newsstands approximately one week after that paper commenced publication. Given the record of this case, an inference of this nature is clearly untenable.

In First National Bank of Arizona v. Cities Service Co., 391 U.S. 253 (1968), a treble-damage claimant asserted that Cities Service's sudden abandonment of pending negotiations to purchase plaintiff's oil was evidence of its participation with other defendants in an alleged boycott and conspiracy intended to restrain plaintiff's sale of Iranian oil. Affirming the District Court's grant of summary judgment in favor of defendant Cities Service,* the Supreme Court held that Cities Service's refusal to deal with plaintiff was not in itself sufficient to draw an inference of conspiracy when viewed in the evidentiary context of the entire case.

Had plaintiff's asserted inference of conspiracy in Cities Service stood alone without any contradiction, then the Court may have been compelled to view motive and intent as a

*Waldron v. British Petroleum Co., 38 F.R.D. 170 (S.D.N.Y. 1965), aff'd, 361 F.2d 671 (2d Cir. 1966).

jury question. However, because the Court was presented with a record which manifestly dispelled the credibility of the asserted inference, there was no purpose in yielding to the rule established in Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962) that summary judgment should not be granted in complex litigation where motive and intent are crucial. As in other cases where summary judgment was granted and as in this case, the contradicting evidence which the Court found so overwhelmingly convincing in Cities Service was a simple, but plausible and coherent business judgment which adequately explained defendant's refusal to deal. The explanation offered and accepted by the Court was that Cities Service feared economic retaliation from other oil companies if it purchased plaintiff's Iranian oil.

On the motion for summary judgment, a completely logical explanation was given as to why the Mirror was removed from Ancorp's newsstands approximately six days after its publication. From the affidavits of Mr. Gordon and Mr. Rauch, in addition to the testimony of Mr. McCollough, it is obvious that Mr. Farrell, as publisher of the Mirror, decided to change his wholesaler from Archie Gordon's company (Gregg News Co.) to Metropolitan News Co. (DSA 103-104, 108-109, 112-115, 186-191). Ancorp simply refused to buy the Mirror at the higher price offered by the new wholesaler, since that price did not justify the costs of handling a paper which had such a high rate of return. (DSA 108-109, 145, 149-150, 186-191).

Moreover, the instant case presents an even stronger set of facts than those that appear in Cities Service. In Cities Service there was admittedly an ongoing boycott among many oil companies, some of whom were defendants in the action, directed against plaintiff's oil. The question on the motion for summary judgment was whether Cities Service's actions could be construed as a participation in what may have been an illicit conspiracy among the other defendants. Here, there is not even the slightest hint that there was an outstanding boycott or conspiracy to keep the Mirror from circulating. (DSA 104-105). Therefore, in this context, the suggestion that Ancorp's unilateral refusal to deal with plaintiff's new wholesaler can somehow be converted into or lead to an inference of an illegal conspiracy, especially in the absence of even a shred of evidence that the News was in any way connected with that refusal, borders on the absurd.

Plaintiff's bald assertion of conspiracy amounts to the precise situation that was presented in Daily Press, Inc. v. United Press International, 412 F.2d 126 (6th Cir.), cert. denied, 396 U.S. 990 (1969). There, plaintiff was a newspaper which commenced and ceased publication during the period of a newspaper strike which closed down Detroit's two major daily newspapers. Suit was commenced two weeks before plaintiff's paper closed. Plaintiff's claim, which the Court characterized as "blown up out of proportion", was that UPI, at the inducement of the two

struck newspapers and as part of an overall conspiracy to restrain competition and monopolize news services, newspapers and newspaper advertising, refused to furnish plaintiff with its wire services during the strike. Id. at 127. The Sixth Circuit affirmed the District Court's grant of summary judgment in favor of all defendants.

After discovery and submission of affidavits, plaintiff in Daily Press was, like plaintiff here, unable to adduce any facts to support its allegations, other than UPI's refusal to enter into less than a five year contract with the newspaper. Apparently, UPI's refusal to come to terms with plaintiff, and the circumstances surrounding that refusal, were the sole basis on which plaintiff asserted the inference of conspiracy. It was UPI's vigorous contention that the five-year contract was one which was offered to every newspaper and since such a contract was of "crucial importance" to its basic operation, it did not make an isolated exception for plaintiff. Id. at 131-132.

Pointing out that there was no claim of any direct proof of conspiracy, the Court then found that the discovery indicated, as it does here, that there was "no circumstantial evidence from which inferences could be properly drawn, even tending to establish an agreement". Id. at 133. From the deposition testimony of various corporate officers of the two newspaper defendants, it was clear that the newspapers did nothing to interfere with

plaintiff's acquisition of wire services from UPI. The News is in a similar position here since there is no evidence to establish any connection between the News and Ancorp's refusal to carry the Mirror. (DSA 104-106).

Since, in Daily Press, there was not an "iota of proof" that the newspaper defendants induced UPI not to sell its wire services to plaintiff, there was necessarily a failure of proof as to conspiracy. This conclusion led the Court to accept the District Court's characterization of plaintiff's proof as follows:

> "[P]laintiff's case is supported by inference drawn from inference based upon inference supported by facts which are in themselves mere conclusions, and inferences drawn from other facts." Id. at 133.

At best, plaintiff's case in this action can be characterized in an identical manner.

Thus, it is well established that a refusal to deal by one defendant, standing alone, and with a plausible business justification, is not sufficient to establish even an inference of conspiracy among all defendants. See First National Bank of Arizona v. Cities Service Co., supra; Modern Home Institute, Inc. v. Hartford Acc. & Indem. Co., supra; Bushie v. Stenocord Corp., 460 F.2d 116 (9th Cir. 1972); Daily Press, Inc. v. United Press International, 412 F.2d 126 (6th Cir.), cert. denied, 396 U.S. 990

(1969); Levin v. Nat'l. Basketball Ass'n., 385 F. Supp. 149 (S.D.N.Y. 1974); Bay City-Abrahams Bros., Inc. v. Estee Lauder, Inc., 375 F. Supp. 1206 (S.D.N.Y. 1974); Oak Distributing Co. v. Miller Brewing Co., 370 F. Supp. 889 (E.D. Mich. 1973); D & M Distributors, Inc. v. Texaco, Inc., 1970 Trade Cases ¶73,099 (C.D. Cal. 1970); Cohen v. Curtis Publishing Co., 31 F.R.D. 569 (D. Minn. 1962), aff'd, 312 F.2d 747 (8th Cir.), cert. denied, 375 U.S. 850 (1963); Dale Hilton, Inc. v. Triangle Publications, Inc., 27 F.R.D. 468 (S.D.N.Y. 1961).

Recently this Court affirmed summary judgment in favor of defendants who had been charged with a concerted refusal to deal in violation of Section 1 of the Sherman Act. Modern Home Institute, Inc. v. Hartford Acc. & Ind. Co., 513 F.2d 102 (2d Cir. 1975). In that case, it was alleged that defendants engaged in a conspiracy to restrain insurance companies from purchasing lists from plaintiffs of names of holders of automobile insurance policies along with the dates on which their policies expired. Though the material facts and the refusals to purchase were not in dispute, defendants strongly contested, by use of the record and affidavits, plaintiffs' allegation that such refusals were acts in furtherance of a conspiracy. As in the instant case, it was not the facts themselves, but the conclusion drawn from them which was in dispute.

On the motion for summary judgment, each company had

come forward to deny the conspiracy and to demonstrate that its rejection of plaintiffs' proposal was for independent business reasons. As here, plaintiffs could not, in all the discovery that was afforded them, adequately contradict defendants' evidence that their respective actions were not pursuant to a conspiracy. Holding that no issue of triable fact was raised by plaintiffs, this Court stated:

> "Under these circumstances, unless plaintiffs have thus far turned up evidence from the defendants or elsewhere supporting their conspiracy theory we do not see how, in the face of defendants' uncontradicted evidence negating it, trial would give them any greater opportunity to elicit from defendants and their employees evidence tending to prove it. [citations omitted]. If the most that can be hoped for is the discrediting of defendants' denials at trial, no question of material fact is presented. See First National Bank v. Cities Service Co., supra; Dyer v. MacDougall, 201 F.2d 265, 268-69 (2d Cir. 1952)." Id. at 110. (emphasis added).

See also, Beckman v. Walter Kidde & Co., 316 F. Supp. 1321 (E.D.N.Y. 1970), aff'd per curiam, 451 F.2d 593 (2d Cir. 1971), cert. denied, 408 U.S. 922 (1972) where summary judgment was granted in the face of an uncontradicted, categorical denial of conspiracy and a logical business decision which explained defendants' refusal to sell fire extinguishers to plaintiff.

E. The record is barren on the Section 2 claim

With respect to plaintiff's Section 2 claim, it is by

no means clear by a reading of the complaint how that Section was intended to apply to defendants in this action. Section 2 prohibits monopolizing, or attempting to monopolize or combining with others to monopolize trade or commerce within any defined market. Whatever plaintiff's intention may have been, both the complaint and the record in this case are bereft of any statement, showing or suggestion that any of the defendants violated this Section.* There is utterly no proof that the News had the power to control prices or unreasonably restrain trade, nor is there any evidence of specific intent to monopolize. ALW, Inc. v. United Airlines, Inc., 510 F.2d 52, 55 (9th Cir. 1975); Daily Press, Inc. v. United Press International, supra, at 133; Beckman v. Walter Kidde & Co., supra, at 1323.

It is also obvious that the viability of plaintiff's claims under the Donnelly Act and New York common law is dependent on its ability to prove violations of the Sherman Act and therefore, must also fall.

F. In the absence of specific or independent facts, summary judgment should be affirmed

When boiled down, plaintiff's case is an extremely

*Even if plaintiff's belated assertion of the 1963 agreement between the News and the Hearst Corporation is to be given any consideration, it hardly advances a Section 2 claim. (App. Br. 20-24). Certainly an agreement to acquire the assets of another newspaper in 1963, standing alone, cannot serve as an inference of intent or attempt to monopolize, much less monopolization in 1970-1972. Cf. United States v. Empire Gas Corporation, 393 F. Supp. 903, 914 (W.D. Mo. 1975). Moreover, it is impossible to understand how plaintiff can complain of this agreement since if anything it benefited, not harmed, plaintiff's attempt to enter the market. See p. 68 of this brief.

simple one. It asserts that Ancorp, Garfinkle and the News conspired to drive it out of business by preventing the newspaper from being circulated on Ancorp's newsstands. (DSA 3-4). Yet, plaintiff was and still is unable to present independent or specific facts in support of its conclusory allegations. In the face of a plausible business explanation and a total void of evidence as to conspiracy, the fact that the Mirror was removed from Ancorp's newsstands is "not susceptible to the interpretation which" plaintiff presumably seeks to give it. First National Bank of Arizona v. Cities Service Co., supra, at 289; Modern Home Institute, Inc. v. Hartford Acc. & Ind. Co., supra.

It is precisely this type of case which should have been summarily disposed of, especially when plaintiff, in the four years in which this action has been pending, had an untrammelled opportunity to seek out facts to support its conclusory allegations. (JA 92-93; DSA 104-105). It found none because there were none.

In instances as this one "summary judgment is properly granted to lower the curtain on costly litigation where it is clear beyond cavil that one side simply has no support for its version of the alleged facts". Coniglio v. Highwood Services, Inc., 495 F.2d 1286, 1293 (2d Cir.), cert. denied, 419 U.S. 1022 (1974); Community of Roquefort v. William Faehndrich, Inc., 303 F.2d 494, 498 (2d Cir. 1962). Moreover, summary judgment may

not be defeated "by the vague hope that something may turn up at trial". Perma Research and Development Co. v. Singer Co., 410 F.2d 572, 578 (2d Cir. 1969).

Plaintiff, as has been demonstrated, is simply not entitled "to the luxury of a trial upon non-existent issues". Beckman v. Walter Kidde Co., supra, at 1328; Capital Temporaries, Inc. of Hartford v. Olsten Corp., 365 F. Supp. 888, 895 (D. Conn. 1973), aff'd, 506 F.2d 658 (2d Cir. 1974). Therefore, the logical policy forged in Cities Service has every application to this case.

> "To the extent that petitioner's burden-of-proof argument can be interpreted to suggest that Rule 56(e) should, in effect, be read out of antitrust cases and permit plaintiffs to get to a jury on the basis of the allegations in their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support those allegations, we decline to accept it. While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint."
> 391 U.S. at 289-290.

The record is clear that all plaintiff could have done at trial was to attempt to impeach a string of witnesses who had already testified in depositions and failed to lend substance to any of the allegations in plaintiff's complaint. Judge Frankel

was right to end this lawsuit. For him to have done otherwise, would have resulted in waste of judicial time and substantial and unconscionable expense, all in pursuit of an absolutely predictable result -- a judgment dismissing the complaint at the end of plaintiff's case.

In view of the foregoing, the judgment dismissing the complaint should be affirmed.

POINT VI

JUDGE FRANKEL'S DISMISSAL FOR FAILURE TO PROSECUTE SHOULD BE AFFIRMED

In his order of June 9, 1975, Judge Frankel, on the alternative or additional ground dismissed plaintiff's complaint for failure to prosecute. (JA 93). In view of the bizarre record in this case, including a continuous pattern of delay and disobedience of the Federal Rules and court orders, it is clear that Judge Frankel's dismissa. on this ground was both justified and appropriate.

Plaintiff contends that because no motion was made by any of the defendants to dismiss for failure to prosecute, Judge Frankel was without power to do so on his own accord. (App. Br. 15, 43). However, the law is to the contrary. It is firmly established that a District Court Judge has the inherent power, acting on his own initiative, to dismiss a case for failure to prosecute. Link v. Wabash Railroad Co., 370 U.S. 626 (1962).

As the Court in Link v. Wabash Railroad Co., supra, held:

> "The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted. The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts. The power is of ancient origin, having its roots

> in judgments of nonsuit and non prosequitur entered at common law, e.g., 3 Blackstone, Commentaries (1768), 295-296, and dismissals for want of prosecution of bills in equity, e.g., id., at 451." Id. at 629 to 630.

Moreover, given the circumstances in this case, Judge Frankel was not even required to give plaintiff advance notice or to hold an adversary hearing. Link v. Wabash Railroad Co., supra, at 632.

Plaintiff's deliberate failure to respond to defendants' motion for summary judgment, as well as all of its other actions, as heretofore described which were obviously done with the intent to indefinitely delay the disposition of its case, clearly compelled dismissal. Judge Frankel properly exercised his discretion in doing so and in the absence of a showing of clear abuse, which we submit has not been made, his order should be affirmed. Link v. Wabash Railroad Co., supra; Maiorani v. Kawasaki Kisen K. K., Kobe, 425 F.2d 1162 (2d Cir.), cert. denied, 399 U.S. 910 (1970); Slumbertogs, Inc. v. Jiggs, Inc., 353 F.2d 720 (2d Cir. 1965), cert. denied, 383 U.S. 969 (1966); Levine v. Colgate-Palmolive Co., 283 F.2d 532 (2d Cir.), cert. denied, 365 U.S. 821 (1960); Edmond v. Moore-McCormack Lines, 253 F.2d 143 (2d Cir.), cert. denied, 358 U.S. 848 (1958).

CONCLUSION

For the reasons urged in Point I, plaintiff's entire appeal or so much of it as purports to appeal from the District Court's order of June 9, 1975 and judgment entered thereon June 11, 1975 should be dismissed for lack of jurisdiction. If the entire appeal is not dismissed, the District Court's order of July 3, 1975 which was entered on July 7, 1975 should be affirmed for the reasons urged in Point II. In the event this Court finds jurisdiction to review the merits of Judge Frankel's decisions in his memorandum and order of June 9, 1975, that order and the judgment entered thereon June 11, 1975, should be affirmed for the reasons urged in Points III, IV, V and VI.

Respectfully submitted,

TOWNLEY, UPDIKE, CARTER & RODGERS
220 East 42nd Street
New York, New York 10017
(212) 682-4567
Attorneys for Defendant-Appellee
New York News Inc.

MARK D. GERAGHTY
FREDERICK D. BERKON

Of Counsel

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
CITY OF NEW YORK,
COUNTY OF NEW YORK, *ss.:*

KALMAN SCHOENFLED, being duly sworn, deposes and says, that he is over the age of 18 years. That on the 8 day of January, 1976 at No. 67 Park Avenue in the City of New York, State of New York he served the foregoing 2 copies of Brief & 1 Copy of Supplemental Appendix upon ROBERT W. FARRELL, Esq. by delivering to and leaving personally with his doorman a true copy thereof.

Deponent further says, that he knew the person served as aforesaid, to be the Agent for Robert W. Farrell the person mentioned and described in said Appendix & Brief as the Attorney for Plaintiff-Appellant therein.

Sworn to before me this
8 day of January, 1976

Sylvia Morris
Notary Public

SYLVIA MORRIS
Notary Public for the State of New York
No. 31-4526651
Qualified in New York County
Commission Expires March 30, 1976

v Kalman Schoenfeld
KALMAN SCHOENFELD

Service of [illegible] copies of this within
Brief is admitted this
2 day of January, 1976

ATTORNEY FOR Defendant-Appellee
Henry Garfinkel

Sayre, Bacon & Bolan, P.C.
1/8/76 mld